

Before the  
UNITED STATES COPYRIGHT ROYALTIES BOARD  
Library of Congress  
Washington, D.C.

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In Re: : Docket No.  
: 15-CRB-0001-WR  
Determination of Royalty : (2016-2020)  
Rates and Terms for : Volume 2-PUBLIC  
Ephemeral Recording and : Pages 331-388  
Digital Performance of : Pages 408-436  
Sound Recordings (Web IV) : Pages 574-664  
-----:

PUBLIC SESSION

Washington, D.C.

Tuesday, April 28, 2015

The hearing in the above-entitled  
matter was convened at 9:00 a.m.

BEFORE COPYRIGHT ROYALTY JUDGES:

SUZANNE M. BARNETT, CHIEF JUDGE

DAVID R. STRICKLER, JUDGE

JESSE FEDER, JUDGE

Capital Reporting Company  
In Re: Determination of Royalty Rates (Public) 04-28-2015

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333	<p>1 APPEARANCES (CONTINUED)</p> <p>2 On behalf of National Public Radio:</p> <p>3 KING &amp; SPALDING, LLP</p> <p>4 KENNETH L. STEINTHAL, ESQUIRE</p> <p>5 101 Second Street</p> <p>6 Suite 2300</p> <p>7 San Francisco, California 94105</p> <p>8 415-318-1211</p> <p>9 On behalf of Intercollegiate Broadcasting and</p> <p>10 Harvard Radio:</p> <p>11 WILLIAM MALONE, ESQUIRE</p> <p>12 40 Cobble's Green</p> <p>13 205 Main Street</p> <p>14 New Canaan, Connecticut 06840</p> <p>15 203-966-4770</p> <p>16 On behalf of National Religious</p> <p>17 Broadcasters:</p> <p>18 WILEY REIN, LLP</p> <p>19 KARYN ABLIN, ESQUIRE</p> <p>20 1776 K Street, N.W.</p> <p>21 Washington, D.C. 20006</p> <p>22 202-719-7008</p> <p>23 On behalf of Educational Media Foundation</p> <p>24 DAVID D. OXENFORD, ESQUIRE</p> <p>25 WILKINSON BARKER KNAUER, LLP</p> <p>2300 N Street, N.W.</p> <p>Suite 700</p> <p>Washington, D.C. 20037</p> <p>202-783-4141</p> <p>On behalf of College Broadcasters:</p> <p>CONSTANTINE CANNON</p> <p>DAVID GOLDEN, ESQUIRE</p> <p>1001 Pennsylvania Avenue, N.W.</p> <p>Washington, D.C. 20004</p> <p>202-204-4527</p>	335
332	<p>1 ALSO PRESENT:</p> <p>2 For SoundExchange:</p> <p>3 Kelly Klaus, Melinda LeMoine, Martha</p> <p>4 Larraondo-Klipper, Rose Ehler, Anjan Choudhury,</p> <p>5 Colin Rushing, Jonathan Blavin, Jennifer Bryant,</p> <p>6 Kuruvilla Olasa, Rachel June Draper</p> <p>7</p> <p>8 For SiriusXM:</p> <p>9 Jackson Toof, Martin Cuniff, Patrick Donnelly,</p> <p>10 Cynthia Greer</p> <p>11</p> <p>12 For NPR:</p> <p>13 Joseph Wetzel, Ethan Davis, Antonio Lewis,</p> <p>14 Gregory Lewis</p> <p>15</p> <p>16 For Pandora:</p> <p>17 Todd Larson, Christopher Harrison, Benjamin</p> <p>18 Marks, David Yolkut, Elisabeth Sperle</p> <p>19</p> <p>20 For iHeartMedia:</p> <p>21 John Thorne, Tres Williams, Rob Wells, Donna</p> <p>22 Schneider, Evan Leo, Kevin Miller, Scott</p> <p>23 Angstreich, Caitlin Hall, Leslie Pope</p> <p>24 For NAB:</p> <p>25 Michael Sturm, Jennifer Elgin, Suzanne Head,</p> <p>Jillian Volkmar</p> <p>Bonnie L. Russo, Capital Reporting Company</p>	334
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337	<p>1 (THIS BEGINS PUBLIC SESSION)</p> <p>2 P R O C E E D I N G S</p> <p>3</p> <p>4</p> <p>5</p> <p>6 CHIEF JUDGE BARNETT: Good morning.</p> <p>7 Please be seated.</p> <p>8 MR. HANSEN: I want to introduce</p> <p>9 Leslie Pope and Evan Leo who are on our team.</p> <p>10 CHIEF JUDGE BARNETT: Thank you.</p> <p>11 MR. POMERANTZ: And, Your Honor, if I</p> <p>12 may do the same. Ms. Rose Ehler from our firm</p> <p>13 is joining us here today. You will get to know</p> <p>14 her during the course of the proceeding, and</p> <p>15 also Mr. Dave Jacoby, in-house counsel for Sony</p> <p>16 Music and Mr. Jacoby is joining us here today.</p> <p>17 CHIEF JUDGE BARNETT: Thank you. And</p> <p>18 thank you for telling me how to pronounce Ms.</p> <p>19 Ehler's name.</p> <p>20 Welcome on this World Intellectual</p> <p>21 Property Day. For those of you who aren't</p> <p>22 critically involved in the hearing, from 10:00</p> <p>23 to noon in the Montpellier Room on the 6th</p> <p>24 Floor, there's going to be a world intellectual</p> <p>25 property forum of some sort. You might have</p>	339	<p>1 MR. HANSEN: Very briefly, Your</p> <p>2 Honor.</p> <p>3 I think Mr. Klaus is forthright</p> <p>4 saying there isn't written direct testimony, not</p> <p>5 even a written rebuttal under the governance</p> <p>6 proceeding or reaffirmed by the panel as</p> <p>7 recently as of last week pursuant to Section</p> <p>8 351.10(b). The only oral testimony allowed to</p> <p>9 be presented here is an oral summary of the</p> <p>10 written direct testimony. New matter is not</p> <p>11 permitted as part of this proceeding, for very</p> <p>12 good reasons. We're entitled to know before the</p> <p>13 hearing what the testimony is going to be. So</p> <p>14 the rules prohibit it. There's no basis for</p> <p>15 departing from the rules, and it didn't belong</p> <p>16 back and forth about how the panel committed</p> <p>17 Professor Rubinfeld after the closing of the</p> <p>18 written testimony to supplement and the panel</p> <p>19 made resolutions about that matter to deal with</p> <p>20 that, but the panel, at the same time, said no</p> <p>21 one gets to file additional materials without</p> <p>22 permission of the panel.</p> <p>23 So they could have, I suppose, sought</p> <p>24 permission to amend Mr. Kooker's written direct</p> <p>25 testimony. They didn't do so. They even as</p>

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340	<p>1 recently as a few days ago, sent us a summary of</p> <p>2 what Mr. Kooker would cover that had no</p> <p>3 reference to any of this.</p> <p>4 So to inject new matter against the</p> <p>5 rules at this part of the proceeding would be</p> <p>6 entirely unfair against the law, frankly, with</p> <p>7 no basis for adhering to the law and is</p> <p>8 prejudicial to us.</p> <p>9 CHIEF JUDGE BARNETT: Thank you.</p> <p>10 MR. KLAUS: I don't think it's</p> <p>11 prejudicial at all, Your Honor. They had the</p> <p>12 Apple agreements when they deposed Mr. Kooker.</p> <p>13 Their experts have now filed supplemental</p> <p>14 materials addressing them and, quite frankly, I</p> <p>15 think the services are being quite candid about</p> <p>16 this. If Mr. Kooker doesn't explain the</p> <p>17 modeling, then there is no witness from Sony who</p> <p>18 will be on record as having explained the</p> <p>19 modeling, which may suit the services as far as</p> <p>20 a tactical advantage, but it really doesn't heed</p> <p>21 the presentation of a full accurate record to</p> <p>22 the judges.</p> <p>23 CHIEF JUDGE BARNETT: Thank you.</p> <p>24 We will confer in the other room for</p> <p>25 a moment.</p>	342	<p>1 Does that particular basis always</p> <p>2 exist, that is does it pertain to all witnesses</p> <p>3 in this first half of the case?</p> <p>4 That is, you want to hear the Apple</p> <p>5 evidence in the second half of the case and all</p> <p>6 parties will present that evidence in the second</p> <p>7 half? So, for example, we have Professor</p> <p>8 Rubinfeld coming to testify either later this</p> <p>9 week or beginning of next week, and he can</p> <p>10 present that evidence now in the direct case, or</p> <p>11 we can wait to present it in the rebuttal case.</p> <p>12 I think we had had a discussion where we were</p> <p>13 all thinking we were presenting it in the direct</p> <p>14 case, but that's fine. We can present it in the</p> <p>15 rebuttal case. We'll do it whichever way Your</p> <p>16 Honor would prefer.</p> <p>17 JUDGE STRICKLER: Subject to whatever</p> <p>18 stipulations you want to propose that we adopt,</p> <p>19 if evidence was presented in the direct case,</p> <p>20 that's what should be presented due to direct</p> <p>21 testimony. And if it was presented in the</p> <p>22 rebuttal case, then we'll wait for the rebuttal</p> <p>23 case.</p> <p>24 MR. POMERANTZ: It's a little bit odd</p> <p>25 with respect to Apple because of when it was</p>
341	<p>1 (Pause in proceedings.)</p> <p>2 CHIEF JUDGE BARNETT: For purposes of</p> <p>3 this motion, I'm deferring to Judge Strickler,</p> <p>4 who will deliver the ruling of the judges.</p> <p>5 JUDGE STRICKLER: The judges have</p> <p>6 decided that at this point the issue is not</p> <p>7 right with regard to whether or not the witness,</p> <p>8 Mr. Kooker, can testify with regard to the Apple</p> <p>9 licenses. The evidence with regard to the Apple</p> <p>10 licenses hasn't come in through the</p> <p>11 SoundExchange statements entry to rebuttal</p> <p>12 statements, and, as a consequence, we have</p> <p>13 concluded that those are -- that is rebuttal</p> <p>14 testimony. And to the extent any testimony may</p> <p>15 ultimately be permitted by a SoundExchange</p> <p>16 witness in response to the rebuttal testimony</p> <p>17 from the licensing services with regard to the</p> <p>18 Apple licenses, we will make a determination on</p> <p>19 that should such testimony be offered in the</p> <p>20 rebuttal proceeding.</p> <p>21 But for purposes of the direct</p> <p>22 testimony by Mr. Kooker, he is not to be</p> <p>23 questioned with regard to the Apple licenses.</p> <p>24 MR. POMERANTZ: Your Honor, may I</p> <p>25 just ask for one clarification?</p>	343	<p>1 submitted because it was -- it was in Professor</p> <p>2 Rubinfeld's rebuttal testimony, and then they --</p> <p>3 we unredacted it two days later, but I thought</p> <p>4 there was a ruling by Your Honors that deemed it</p> <p>5 as if it was submitted as part of our direct</p> <p>6 case.</p> <p>7 We're just trying to have a</p> <p>8 meaningful joinder of the issues. Mr. Kooker,</p> <p>9 for example, is a rebuttal witness. So if, you</p> <p>10 know -- he can come back in our rebuttal case,</p> <p>11 and as long as he's permitted, assuming you deem</p> <p>12 it appropriate to respond to evidence that's</p> <p>13 come up early in the proceeding with respect to</p> <p>14 Apple, we can certainly have Mr. Kooker address</p> <p>15 it when he comes back in the rebuttal case. I'm</p> <p>16 really asking for guidance as to whether, for</p> <p>17 example, Professor Rubinfeld should be</p> <p>18 addressing the Apple agreements in the direct</p> <p>19 testimony or in the rebuttal testimony.</p> <p>20 CHIEF JUDGE BARNETT: As I recall on</p> <p>21 our telephone conference, it was Mr. Hansen who</p> <p>22 was concerned that -- that the services be given</p> <p>23 an opportunity to respond to Dr. Rubinfeld's</p> <p>24 rebuttal, which means it would have to be</p> <p>25 presented as part of the direct case. And I</p>

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344	<p>1 believe that was your request, Mr. Hansen.</p> <p>2 MR. HANSEN: Your Honor, here is our</p> <p>3 request. I believe when you ruled, you said</p> <p>4 that Mr. Rubinfeld and only Mr. Rubinfeld's</p> <p>5 testimony could -- would be considered part of</p> <p>6 the direct case, even though he submitted it at</p> <p>7 the rebuttal phase. We are prepared to deal</p> <p>8 with that. That's fine. We'll cross-examine</p> <p>9 Dr. Rubinfeld.</p> <p>10 What I don't want is the camel's nose</p> <p>11 in the tent here. They can't have Mr. Pomerantz</p> <p>12 say, well, then come back and do a rebuttal.</p> <p>13 They can't do rebuttal because there's no</p> <p>14 written rebuttal testimony from the witnesses,</p> <p>15 and we're not going to be able to offer evidence</p> <p>16 that they haven't put -- in other words, I think</p> <p>17 sufficient for today is we're on the written</p> <p>18 direct case. This witness can't give anything</p> <p>19 beyond his written direct testimony. I think</p> <p>20 we're agreed on that.</p> <p>21 For Professor Rubinfeld, a different</p> <p>22 issue. I think we do expect him to talk about</p> <p>23 Apple, per your ruling. That is fine.</p> <p>24 CHIEF JUDGE BARNETT: All right.</p> <p>25 MR. HANSEN: What happens in the</p>	346	<p>1 services as a result of the fact that it came in</p> <p>2 late would be handled in a direct case and we</p> <p>3 would have the opportunity to rebut.</p> <p>4 With respect to the fact witnesses,</p> <p>5 SoundExchange could have done the same thing</p> <p>6 they did with Professor Rubinfeld. We would</p> <p>7 have gotten special relief. They -- they are</p> <p>8 now trying to add in an extra, and I view the</p> <p>9 two circumstances as completely different. So</p> <p>10 that may be a me, too, but I just wanted to add.</p> <p>11 CHIEF JUDGE BARNETT: Sounds like a</p> <p>12 me, too.</p> <p>13 Mr. Rich, no.</p> <p>14 MR. RICH: This is not a me, too.</p> <p>15 This is an addition on the subject of rebuttal.</p> <p>16 Another gating issue as it were with respect to</p> <p>17 the first witness's testimony for SoundExchange</p> <p>18 involves an effort on their part to rescrumble</p> <p>19 the egg which Your Honor has unscrambled in</p> <p>20 terms of dichotomist direct versus rebuttal</p> <p>21 testimony. I'm going to let my colleague, Mr.</p> <p>22 Larson, who's going to be cross-examining,</p> <p>23 explain what we learned yesterday about the</p> <p>24 proposed substance of the direct examinations</p> <p>25 this morning, and we think would be appropriate,</p>
345	<p>1 rebuttal phase proceeding, I think you should</p> <p>2 preserve that issue for when it comes up and I</p> <p>3 think both sides will have their arguments at</p> <p>4 that time, but I don't want any advance rulings</p> <p>5 unless we have a whole record. What Mr. Kooker</p> <p>6 will say -- I don't think he can say it then and</p> <p>7 I don't think he will be able to say it then.</p> <p>8 We have today's ruling. We can deal with other</p> <p>9 issues.</p> <p>10 CHIEF JUDGE BARNETT: Okay. Thank</p> <p>11 you.</p> <p>12 Mr. Kooker is a fact witness. He can</p> <p>13 testify today if he -- I think after</p> <p>14 Dr. Rubinfeld's given direct and rebuttal, we</p> <p>15 may not need Mr. Kooker, but I'm not your</p> <p>16 strategist.</p> <p>17 Mr. Joseph, you were on your feet, is</p> <p>18 that a me, too? Not allowed.</p> <p>19 MR. JOSEPH: No. Actually, Your</p> <p>20 Honor, I think Mr. Hansen said it well. I was</p> <p>21 going to simply clarify. I was the one with</p> <p>22 respect to Dr. Rubinfeld who had wanted to be</p> <p>23 clear that the 3E and Apple testimony of</p> <p>24 Professor Rubinfeld, which had come in under</p> <p>25 special condition, special relief granted to the</p>	347	<p>1 again as a general rule of application, to get</p> <p>2 some clarification around that issue if we may.</p> <p>3 MR. POMERANTZ: Your Honor, that's</p> <p>4 a -- I just wanted to finish the loop on the</p> <p>5 Apple issue. We -- we were prepared to have</p> <p>6 Professor Rubinfeld address it in our direct</p> <p>7 case, and that's fine.</p> <p>8 CHIEF JUDGE BARNETT: Okay.</p> <p>9 MR. POMERANTZ: We would just -- we</p> <p>10 understand that you're deferring the issue as to</p> <p>11 whether Mr. Kooker and Mr. Wilcox from Warner</p> <p>12 can address it rebuttal after seeing the</p> <p>13 evidence. I think Professor Shapiro didn't use</p> <p>14 the right Sony model and Mr. Kooker can explain</p> <p>15 that. So he can explain which models they</p> <p>16 really relied on.</p> <p>17 MR. HANSEN: Your Honor, I don't</p> <p>18 think we should be giving testimony here. I</p> <p>19 don't think we should have endless argument. We</p> <p>20 have the Court's ruling. We should be given</p> <p>21 fact testimony about what the experts will say.</p> <p>22 MR. POMERANTZ: Your Honor, I'm</p> <p>23 making a proffer so Your Honors can understand</p> <p>24 the context here.</p> <p>25 CHIEF JUDGE BARNETT: Let's just get</p>

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<p>1 Mr. Kooker on the stand. I don't -- we don't 2 need a proffer about what might or might not 3 come along. 4 Mr. Rich? 5 MR. RICH: May Mr. Larson be heard on 6 this second issue, Your Honor? 7 CHIEF JUDGE BARNETT: Mr. Larson is 8 always welcome to speak. 9 MR. RICH: Thank you. 10 MR. LARSON: Thank you, Your Honor. 11 So, as Mr. Rich said, Your Honors 12 ordered separate direct rebuttal phases. We 13 received demonstratives last night from 14 SoundExchange per the parties' agreement to 15 exchange those demonstratives. And seven or 16 eight of the ten demonstratives are taken 17 directly from Mr. Kooker's rebuttal testimony. 18 And per the discussion we were just 19 having, we wanted to get a ruling on that. I 20 think it's going to apply to cross witnesses. 21 We prepared for today, expecting Mr. Kooker's 22 written direct testimony to be offered, not his 23 written rebuttal testimony, and so we think it's 24 unfair to the services and also outside the -- 25 technically outside the scope of the ruling that</p>	<p>1 direct statement from Mr. Kooker, and he's also 2 submitted no amended testimony, and then he's 3 got a written rebuttal testimony that we'll 4 present later. 5 CHIEF JUDGE BARNETT: Mr. Kooker, I 6 presume? 7 THE WITNESS: Yes. 8 CHIEF JUDGE BARNETT: Please stand 9 and raise your right hand. 10 DENNIS KOOKER, 11 being first duly sworn, to tell the truth, the 12 whole truth and nothing but the truth, testified 13 as follows: 14 CHIEF JUDGE BARNETT: Please be 15 seated. 16 And if you could begin by stating 17 your full name and spell your last name for the 18 Court, please. 19 THE WITNESS: Sure. My full name is 20 Dennis Carl Kooker, Jr. Last name K-O-O-K-E-R. 21 CHIEF JUDGE BARNETT: Thank you. 22 MR. KLAUS: And we passed out to 23 Counsel copies of potential exhibits that we may 24 use. And, Mr. Kooker, we've placed a copy in 25 front of you, and I'll let you know where to</p>
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<p>1 was cited by Mr. Hansen's 351.10 meeting. 2 CHIEF JUDGE BARNETT: Thank you. 3 Mr. Klaus. 4 MR. KLAUS: Yes. To expedite things 5 to get to Mr. Kooker, I think this is a nonissue 6 because I actually don't plan to use the 7 demonstratives that he's talking about. 8 CHIEF JUDGE BARNETT: Thank you. 9 MR. KLAUS: May I call Mr. Kooker, 10 Your Honor? 11 CHIEF JUDGE BARNETT: Please. 12 MR. KLAUS: Your Honor, SoundExchange 13 calls Dennis Kooker. 14 And, Your Honor, I should also say in 15 line with our discussion about the 16 demonstratives, this is good news. I think I 17 will refer to very, very few of the exhibits 18 that are in the binder. Perhaps, as we move 19 along in these proceedings, we will be better at 20 winnowing down our submissions. 21 JUDGE STRICKLER: May I ask you a 22 question just before you begin. When I first 23 looked at Mr. Kooker's testimony way back has 24 that changed since then? 25 MR. KLAUS: It's the same written</p>	<p>1 turn in the binder. And for the benefit of the 2 counsel in the room, I'll just say that a number 3 of the documents that are contained in the 4 binder are designated restricted. 5 DIRECT EXAMINATION BY COUNSEL FOR SOUNDEXCHANGE 6 BY MR. KLAUS: 7 Good morning, Mr. Kooker. 8 A. Good morning. 9 Q. Sir, where do you work and what is 10 your position there? 11 A. I work for Sony Music Entertainment, 12 and I'm the president of the global digital 13 business and U.S. sales group. 14 Q. What are the global digital business 15 and U.S. sales group? 16 A. The global digital business is 17 responsible for all of our digital revenue on a 18 global basis. We're -- our teams within the 19 global digital business include partner 20 development, which is focused on our top 20 21 global partners on the digital side of the 22 business. The business development group, which 23 is responsible for all new partners that come 24 in, as well as new models with existing partners 25 in getting those deals completed and into the</p>

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352	<p>1 market. The U.S. sales team, which is</p> <p>2 responsible for all commercial activity, both</p> <p>3 digital and physical in the U.S. market. In</p> <p>4 addition to that, I have a legal and business</p> <p>5 affairs team that is focused primarily on the</p> <p>6 digital deals, but also a significant amount of</p> <p>7 efforts in that group are around antipiracy or</p> <p>8 anti-piracy efforts around the world and working</p> <p>9 with our government relations folks in key</p> <p>10 markets to ensure that our electrical property</p> <p>11 is protected.</p> <p>12 Q. Are you a lawyer, sir?</p> <p>13 A. No, I'm not a lawyer.</p> <p>14 Q. And what are your responsibilities as</p> <p>15 the president of the global digital business and</p> <p>16 U.S. sales group?</p> <p>17 A. Well, to start with, I'm responsible</p> <p>18 for leading a team of over 350 people; and in</p> <p>19 addition to that, accountable for revenues close</p> <p>20 to \$1.5 billion on a global basis; and driving</p> <p>21 and leading our digital strategy, and completing</p> <p>22 every major deal that we do with a digital</p> <p>23 service.</p> <p>24 Q. And can you explain to the judges</p> <p>25 what it is that you do specifically in terms of</p>	354	<p>1 Q. Mr. Kooker, how long have you worked</p> <p>2 in the music industry?</p> <p>3 A. I have worked for almost -- in the</p> <p>4 music industry for almost 20 years now.</p> <p>5 Q. How long have you worked in Sony</p> <p>6 Music's Global Digital Business?</p> <p>7 A. Probably for about the last six or</p> <p>8 seven years.</p> <p>9 Q. If you could -- if I could ask you to</p> <p>10 open the binder that you have Mr. Kooker, you</p> <p>11 will see that the very first tab has your</p> <p>12 written direct testimony in it. It's</p> <p>13 SoundExchange Exhibit No. 12. I will just ask</p> <p>14 you if you could flip through it to the last</p> <p>15 page to verify that that's your signature?</p> <p>16 A. Yes, it is.</p> <p>17 Q. And is this your written direct</p> <p>18 testimony in these proceedings, sir?</p> <p>19 A. Yes, it is.</p> <p>20 Q. Okay. And, to the best of your</p> <p>21 knowledge, is it true and accurate?</p> <p>22 A. Yes, it is.</p> <p>23 MR. KLAUS: Your Honor, I would move</p> <p>24 the admission of SoundExchange Exhibit 12. It's</p> <p>25 the restricted version of Mr. Kooker's written</p>
353	<p>1 reviewing deals that you have with digital</p> <p>2 services?</p> <p>3 A. Yes.</p> <p>4 So as it relates to our deals with</p> <p>5 digital services, depending on the size of the</p> <p>6 deal, it may be that the deal is fully</p> <p>7 negotiated within my team, that they are</p> <p>8 reviewing the deal, is it progressing in the</p> <p>9 negotiations; and, ultimately, the majority of</p> <p>10 those deals would come to me for approval. For</p> <p>11 our larger deals, I may be more -- much more</p> <p>12 directly involved and likely much more directly</p> <p>13 involved in the actual negotiation of those</p> <p>14 deals, in approving those deals; and, if large</p> <p>15 enough, if they require CEO or even some board</p> <p>16 sign off, putting together the approval for</p> <p>17 recommendation for those deals.</p> <p>18 Q. Of the major deals that Sony has done</p> <p>19 over the last five-year period, how many of</p> <p>20 those have you been involved in approving?</p> <p>21 A. Most likely the majority of those</p> <p>22 deals.</p> <p>23 Q. And whom do you report?</p> <p>24 A. I report to Doug Morris, the CEO of</p> <p>25 Sony Music.</p>	355	<p>1 direct testimony.</p> <p>2 CHIEF JUDGE BARNETT: Hearing no</p> <p>3 objection, Exhibit 12 is admitted.</p> <p>4 (SoundExchange Exhibit No. 12 was</p> <p>5 admitted into evidence.)</p> <p>6 CHIEF JUDGE BARNETT: And, Mr. Klaus,</p> <p>7 if you're going to be inquiring about restricted</p> <p>8 matters, you will let us know before you do.</p> <p>9 MR. KLAUS: I will. What I attempted</p> <p>10 to do in my direct, Your Honor, is to cover all</p> <p>11 of the nonrestricted information first, put</p> <p>12 restricted information second. And, as you'll</p> <p>13 see, to the extent that I ask Mr. Kooker a</p> <p>14 question where there is a specific number that</p> <p>15 we have put into the restricted format, it may</p> <p>16 be most efficient to simply alert Your Honors as</p> <p>17 to where that is so that we can all read along</p> <p>18 with it rather than clearing the hearing room.</p> <p>19 CHIEF JUDGE BARNETT: Thank you.</p> <p>20 MR. KLAUS: Thank you.</p> <p>21 BY MR. KLAUS:</p> <p>22 Q. Mr. Kooker, your written direct</p> <p>23 testimony speaks in some detail to the</p> <p>24 investments that Sony Music makes in the</p> <p>25 creation of distribution of marketing of</p>

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<p style="text-align: right;">356</p> <p>1 recorded music. I would just like to ask you if 2 you would summarize and explain to the judges a 3 few of these points. 4 First, can you explain, generally, 5 what Sony Music does to invest in the creation 6 of recorded music? 7 A. Sure. 8 Well, the creative process for us is 9 run through our artist and repertoire division, 10 what we call A and R. And that A and R -- A and 11 R teams are specialists, created specialists in 12 finding talent and working with talent to 13 produce the music that, ultimately, is the 14 product that we bring to market. You know, 15 their focus is in working very closely with the 16 artists from the point of discovering new talent 17 and they do that through listening to demo 18 tapes, to watching performances, to using 19 digital media tools to find new talent. 20 Ultimately, they're also working with producers 21 and studios to schedule time to make the 22 recordings. And, again, have, you know, a very 23 unique expertise in talent spotting. 24 Q. And what sorts of competition do they 25 face in searching for new talent?</p>	<p style="text-align: right;">358</p> <p>1 Sony Music does to invest in the distribution of 2 the recorded music that it creates, and would 3 you please explain to the judges just briefly, 4 generally, what is involved in distributing the 5 recorded music that you create? 6 A. Sure. 7 Well, there's two primary methods. 8 There's physical and digital. The physical side 9 of the business that includes manufacturing the 10 product, getting that product into warehouses, 11 and from warehouses getting, it into brick and 12 mortar retail. 13 On the digital side, it's ingesting 14 that content. It's wrap ping the metadata that 15 is required in order to efficiently move that 16 product into our partners, our digital partners, 17 and for that product to appear correctly to the 18 consumer. That metadata is also very important 19 on the digital side of the business, in 20 particular, because it also contains information 21 that allows the services to report back 22 efficiently to us that we can -- we use that to 23 then do our internal financial reporting and 24 management reporting, as well as report on to 25 our stakeholders like artists and producers.</p>
<p style="text-align: right;">357</p> <p>1 A. It's an incredibly competitive 2 environment. Obviously, when new talent is 3 coming into the market and -- and, you know, 4 they have -- they're working with managers, it's 5 ultimately managers' job to create a competitive 6 situation amongst different labels and record 7 companies. And so there's competition for 8 actually signing the artist in the first place. 9 There's competition to get great songs for 10 artists and for new recordings. There's 11 competition for getting the best producers to 12 work on the records, themselves. So it's a very 13 competitive environment across that entire 14 creative process. 15 Q. And your written direct testimony at 16 Page 4 provides some specific numbers on this 17 that were designated as restricted because 18 they're not publicly recorded. But could you 19 provide the judges with a general sense of the 20 magnitude of the investments that Sony Music 21 makes in the process of finding and creating new 22 music? 23 A. Yes. It's in the hundreds of 24 millions of dollars every year. 25 Q. Your testimony also talks about what</p>	<p style="text-align: right;">359</p> <p>1 Q. And what -- again, without going into 2 the specific numbers that are restricted, what 3 are the magnitude of the investments that you 4 make in distributing your recorded music content 5 on an annual basis? 6 A. With physical and digital combined, 7 it's approaching a hundred million dollars a 8 year. 9 Q. What does -- one of the other things 10 that Sony Music does, I take it, is to market 11 and promote the music that it creates and 12 distributes. 13 What are the types of investments 14 that Sony Music makes in that process of 15 marketing and promotion? 16 A. So the marketing and promotion part 17 of our business, you know, we are focused on 18 gaining exposure for our artists, and there are 19 a multitude of marketing activities that we 20 perform to do that, including working with 21 social media, advertising within social media, 22 advertising online, advertising on radio and 23 television, having artists appear at events, 24 having artists appear on television, working 25 with publicity departments to get articles and</p>



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360	<p>1 reviews done by magazines and case makers.</p> <p>2 Q. And what about promoting content</p> <p>3 within digital platforms, what does your team --</p> <p>4 what does your group do in that area?</p> <p>5 A. So both our sales and our marketing</p> <p>6 team work very closely with our digital partners</p> <p>7 to position our products within those platforms.</p> <p>8 You know, I think where there's a -- often a</p> <p>9 misunderstanding is people think that because a</p> <p>10 platform is available online, therefore shelf</p> <p>11 space is unlimited; whereas, there are</p> <p>12 limitations in the physical world. But, in</p> <p>13 fact, from my experience, the shelf space on our</p> <p>14 digital partners is as limited as what you see</p> <p>15 on -- in the physical world.</p> <p>16 And so while a platform may have all</p> <p>17 of the content, still how you -- how you</p> <p>18 position that content and present it to the</p> <p>19 consumer and how easy it is for the consumer to</p> <p>20 find it remains critically important. And it's</p> <p>21 very, very competitive to win the best</p> <p>22 positioning and promotional slots within our --</p> <p>23 our digital partners.</p> <p>24 Q. How -- and the magnitude of the</p> <p>25 investments that you make in marketing and</p>
362	<p>1 into the market each year.</p> <p>2 Q. And what is an example of such a</p> <p>3 product you make for an album release?</p> <p>4 A. Well, an example would be that we</p> <p>5 would have an album release that would have</p> <p>6 bonus tracks for some retailers, but not all</p> <p>7 retailers. So each -- as a result, having</p> <p>8 different products for different retailers. In</p> <p>9 addition to that, we may make a ringtone for a</p> <p>10 couple of the singles. We'll make videos for a</p> <p>11 few of the singles that would be on the release,</p> <p>12 as well as creating unique content for different</p> <p>13 markets around the world.</p> <p>14 Q. Now, of the new albums that you</p> <p>15 release on an annual basis, approximately how</p> <p>16 many are successful? How many return a net</p> <p>17 positive?</p> <p>18 A. Well, I think when you -- when you</p> <p>19 look at it, probably best to split the business</p> <p>20 between established artists and new artists.</p> <p>21 And so for established artists where we have a</p> <p>22 track record of performance, it is easier to</p> <p>23 estimate and forecast what the results of future</p> <p>24 releases and sales and revenues of future</p> <p>25 releases would be. That being said, there</p>
361	<p>1 promoting the recorded contents that you created</p> <p>2 and distributed, again, without going into</p> <p>3 specific numbers?</p> <p>4 A. Yes. Again, it's in the hundreds of</p> <p>5 millions of dollars a year.</p> <p>6 Q. How does Sony Music earn a return on</p> <p>7 these investments that you described?</p> <p>8 A. Well, ultimately, it's critical that</p> <p>9 the revenue that -- that we are able to produce</p> <p>10 from the market -- from the -- from the consumer</p> <p>11 exceeds the investments that -- these</p> <p>12 investments that we're making, and also the</p> <p>13 investments we make and the overhead and the</p> <p>14 people who actually run the business for us.</p> <p>15 Q. Okay. And how many products do you</p> <p>16 release into the marketplace on an annual basis?</p> <p>17 A. On an annual basis, we release</p> <p>18 probably between 500 and a thousand albums a</p> <p>19 year. But within that -- and especially where</p> <p>20 the business is today where we have a physical</p> <p>21 business, we have a ringtone business, we have a</p> <p>22 streaming business, a video business, and a</p> <p>23 download business, we are making anywhere from</p> <p>24 100 to 200 products for every album released.</p> <p>25 So there's tens of thousands of products that go</p>
363	<p>1 certainly are no guarantees that -- that future</p> <p>2 performance will be indicative of the past.</p> <p>3 For new artists, it's much more</p> <p>4 speculative. And the new artist part of our</p> <p>5 business is really -- it's really the research</p> <p>6 and development of our business. This A and R</p> <p>7 process is a research and development. Our job,</p> <p>8 ultimately, is to -- is to make investments, you</p> <p>9 know, much like other R and D businesses</p> <p>10 industries do around the world. We're making</p> <p>11 investments to ultimately look and hope that we</p> <p>12 have a couple of major hits that break out of</p> <p>13 it.</p> <p>14 Q. And what happens to Sony Music's</p> <p>15 business if you can't make a return on the</p> <p>16 investments that you made?</p> <p>17 A. Well, ultimately, we would have to</p> <p>18 invest less and that would be less, obviously,</p> <p>19 in the talent side of the business and in the</p> <p>20 marketing and promotion, and we would also have</p> <p>21 to reduce our overhead.</p> <p>22 Q. One of the things that you describe</p> <p>23 in some detail in your written testimony is the</p> <p>24 shift from what you described as ownership to</p> <p>25 access models, and I would like to turn to that</p>

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<p style="text-align: right;">364</p> <p>1 subject now.</p> <p>2 And, Mr. Kooker, if you can</p> <p>3 describe -- you've been in the music business</p> <p>4 for 20 years. How has the process of getting</p> <p>5 your music to consumers changed over that</p> <p>6 20-year period?</p> <p>7 A. Quite dramatically. Twenty years ago</p> <p>8 when I started in the business, the primary</p> <p>9 method for getting product to market was</p> <p>10 physical distribution, physical distribution</p> <p>11 into brick and more retail. And while that</p> <p>12 remains an important part of our business</p> <p>13 overall, there are many other channels of</p> <p>14 distribution and ways to get product into the</p> <p>15 market and to consumers, again, including the</p> <p>16 download business, which has been, you know, an</p> <p>17 important part of our business for about 11 or</p> <p>18 12 years now. After the start of the download</p> <p>19 business, we had the introduction of the</p> <p>20 ringtone business, which grew quickly, peaked,</p> <p>21 and has been in decline since then. And then</p> <p>22 the introduction of the streaming business.</p> <p>23 Q. And was the -- just within the time</p> <p>24 period you have been in the music business, was</p> <p>25 the download business free? For example, the</p>	<p style="text-align: right;">366</p> <p>1 access model, what we are trying to do is</p> <p>2 present a service that is compelling enough to</p> <p>3 consumers that, ultimately, they would pay to</p> <p>4 have that service available to them on a month</p> <p>5 in month out basis.</p> <p>6 Q. And what is the current breakdown of</p> <p>7 Sony's revenues between physical on the one hand</p> <p>8 and digital on the other?</p> <p>9 A. In the U.S., for our fiscal year that</p> <p>10 just ended in March, 72 percent of our revenue</p> <p>11 came from digital; 28 percent from physical.</p> <p>12 Q. And within the digital side, what is</p> <p>13 the approximate breakdown between the download</p> <p>14 business on the one hand and the streaming</p> <p>15 business on the other?</p> <p>16 A. Again, in the U.S., which is still</p> <p>17 download heavy, about 60 percent of the business</p> <p>18 revenue is from download and 40 percent from</p> <p>19 streaming.</p> <p>20 Q. And you testified here for a</p> <p>21 different group of judges in 2010; is that</p> <p>22 right, sir?</p> <p>23 A. Yes, I did.</p> <p>24 Q. Okay. How -- and if you could just</p> <p>25 describe how the proportion of your business,</p>
<p style="text-align: right;">365</p> <p>1 iTunes store, was that preceded by a period of</p> <p>2 free downloading in the marketplace?</p> <p>3 A. Yes. As part of this major</p> <p>4 transformation that our business has gone</p> <p>5 through, moving from physical to digital, you</p> <p>6 know, where technology was both a disruptor and</p> <p>7 an opportunity, the disruption point meant that</p> <p>8 it was very easy for consumers to pirate our</p> <p>9 music and our content. And, you know -- and, as</p> <p>10 a result, as part of that transition, you know,</p> <p>11 we have seen a decline in revenues since that</p> <p>12 transition started.</p> <p>13 Q. And has the free availability of</p> <p>14 music and pirate services continued throughout</p> <p>15 the period you've been in the digital global</p> <p>16 business?</p> <p>17 A. Absolutely.</p> <p>18 Q. Now, could you describe, in general</p> <p>19 terms, what is involved in the change from an</p> <p>20 ownership to an access model, as you've</p> <p>21 described it in your written testimony?</p> <p>22 A. Absolutely.</p> <p>23 In an ownership model, ultimately,</p> <p>24 what we our focused on is trying to get</p> <p>25 consumers to buy a piece of product. In an</p>	<p style="text-align: right;">367</p> <p>1 the split in your digital business between</p> <p>2 downloads and streams, how has that changed over</p> <p>3 the last five years?</p> <p>4 A. Well, again, pretty dramatically. I</p> <p>5 think the last time I was here, the predominant</p> <p>6 amount of our revenue on the digital side</p> <p>7 probably well over 90 percent came from the</p> <p>8 download business. So it has been a pretty</p> <p>9 quick shift towards streaming.</p> <p>10 JUDGE STRICKLER: Counsel, can I</p> <p>11 interject.</p> <p>12 Mr. Kooker, you said streaming</p> <p>13 accounts for 40 percent of revenues?</p> <p>14 THE WITNESS: Forty percent of our</p> <p>15 digital revenues.</p> <p>16 JUDGE STRICKLER: Of the digital?</p> <p>17 THE WITNESS: Yes.</p> <p>18 JUDGE STRICKLER: Within that 40</p> <p>19 percent, what percentage is in the interactive</p> <p>20 market and what percentage is in the</p> <p>21 noninteractive market, if you know?</p> <p>22 THE WITNESS: Off the top of my head,</p> <p>23 I don't know specifically. My guess is it's</p> <p>24 probably 60/40 towards our directly-licensed</p> <p>25 partners.</p>

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368	<p>1 JUDGE STRICKLER: Meaning</p> <p>2 interactive?</p> <p>3 THE WITNESS: Yes.</p> <p>4 JUDGE STRICKLER: Thank you.</p> <p>5 MR. KLAUS: Thank you, Your Honor.</p> <p>6 BY MR. KLAUS:</p> <p>7 Q. And, Mr. Kooker, just on the</p> <p>8 subject -- sticking with the subject of your</p> <p>9 download business for a moment, what do you --</p> <p>10 what have seen happening in that download</p> <p>11 business and what do you see happening over the</p> <p>12 next five-year rate period?</p> <p>13 A. Over about the last 18 to 24 months,</p> <p>14 we have seen a decline in -- in our download</p> <p>15 business. And, at this point, in the public</p> <p>16 projections that we have put out through our</p> <p>17 investor relations group, our forecast is that</p> <p>18 the download business is going to continue to</p> <p>19 decline into the foreseeable future.</p> <p>20 Q. And in terms of your total, total</p> <p>21 overall revenues, what are the consequences, if</p> <p>22 any, of the shift from a download business to a</p> <p>23 more streaming-focused revenue-generating</p> <p>24 business?</p> <p>25 A. Well, certainly, over the last five</p>	370	<p>1 you would usually expect to see revenue growing.</p> <p>2 And, in fact, we haven't been able to see that.</p> <p>3 It's -- you know, our revenue has declined for</p> <p>4 over a decade at this point. And so, at this</p> <p>5 point, what we're seeing is -- you know, the</p> <p>6 good news is, is high demand for the product</p> <p>7 from a consumption standpoint, but still</p> <p>8 struggling to monetize that at a rate that</p> <p>9 actually produces growth.</p> <p>10 Q. And are you seeing high demands in</p> <p>11 the streaming market, specifically?</p> <p>12 A. Absolutely. I think the streaming</p> <p>13 market is responsible for this growth in</p> <p>14 consumption.</p> <p>15 Q. Now, over the last several years,</p> <p>16 you've described some of the increases in the</p> <p>17 consumption streaming.</p> <p>18 What have you seen in terms of the</p> <p>19 development of the number of businesses that are</p> <p>20 streaming your musical content?</p> <p>21 A. Well, we continue to see a lot of new</p> <p>22 players coming to the market. We are regularly</p> <p>23 weekly meeting with new businesses who are</p> <p>24 looking to enter the market, and I also know</p> <p>25 that, you know, the number of licensed partners</p>
369	<p>1 years, what we have seen is continued decline in</p> <p>2 revenue overall, a flattening out in the last</p> <p>3 couple of years. And so, you know, again, as we</p> <p>4 move through yet another transition for our</p> <p>5 industry, moving from ownership to access, you</p> <p>6 know, what we're seeing is that it is very hard</p> <p>7 to replace the existing business at a faster</p> <p>8 rate than what that business is declining.</p> <p>9 Q. And on the music consumption side,</p> <p>10 what have you seen in the market in terms of the</p> <p>11 consumption of your musical content?</p> <p>12 A. What we have seen is that our</p> <p>13 consumption continued -- the consumption of</p> <p>14 music continues to increase and increase at a</p> <p>15 very healthy pace.</p> <p>16 Q. Okay. And what -- could you describe</p> <p>17 in some greater specificity for the judges what</p> <p>18 you mean by seeing that consumption increase?</p> <p>19 A. Well, you know, what -- ultimately,</p> <p>20 what we're seeing is that there is a high demand</p> <p>21 for our product, and as it is easier and easier</p> <p>22 for consumers to access music, we're seeing</p> <p>23 greater and greater consumption. So from a</p> <p>24 simple economic standpoint, if you were looking</p> <p>25 at a business where product was in high demand,</p>	371	<p>1 through SoundExchange continues to grow, as</p> <p>2 well.</p> <p>3 Q. And with respect to -- I think you</p> <p>4 described it in response to Judge Strickler's</p> <p>5 question, your directly-licensed partners,</p> <p>6 parties who don't operate on a statutory</p> <p>7 license, how have the numbers of those increased</p> <p>8 over the last -- since you were here in 2010?</p> <p>9 A. Well, I don't recall exactly how many</p> <p>10 licensed partners we had at the time, but I know</p> <p>11 today we're at about 450 licensed partners on a</p> <p>12 worldwide basis.</p> <p>13 Q. And, Mr. Kooker, what do you and your</p> <p>14 team do to keep current with developments in the</p> <p>15 streaming space?</p> <p>16 A. Well, first off, we are in this</p> <p>17 business every single day of the week talking to</p> <p>18 partners who are running the services, analyzing</p> <p>19 the information that we are provided from those</p> <p>20 partners about the performance of the business.</p> <p>21 We are regularly doing research both internally</p> <p>22 and externally, qualitative as well as</p> <p>23 quantitative research. It is an industry that's</p> <p>24 interesting, I think, from a press coverage</p> <p>25 standpoint. So there's a lot of information</p>

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372	<p>1 available in the press, as well as a number of</p> <p>2 publicly-traded companies that are available</p> <p>3 where information is available. So it is -- you</p> <p>4 know, it's critical that our team is immersed</p> <p>5 every day of the week in understanding where the</p> <p>6 market is and where the market is going.</p> <p>7 Q. And what about the services that</p> <p>8 operate that you don't directly license and</p> <p>9 operate under the statutory license? What, if</p> <p>10 anything, do you and your team do to stay</p> <p>11 current on what the features are that they are</p> <p>12 offering?</p> <p>13 A. You know, similarly, we are using</p> <p>14 these services just like we do with our</p> <p>15 directly-licensed partners to make sure that we</p> <p>16 understand the functionality and what the user</p> <p>17 experience overall is. Again, where they're</p> <p>18 publicly-traded companies, there's, obviously,</p> <p>19 public information that is available. We can</p> <p>20 follow metrics, benchmark those metrics across</p> <p>21 other parts of our business. And, again, you</p> <p>22 know, these are companies that are covered well</p> <p>23 in the presses, as well.</p> <p>24 Q. Why do you spend time monitoring the</p> <p>25 developments or offerings of services when you</p>	374	<p>1 are realizing there?</p> <p>2 A. Well, another part of this shift,</p> <p>3 from ownership to access, has meant that we've</p> <p>4 had to shift the metrics that we use to analyze</p> <p>5 the business. And, in the past, it was -- our</p> <p>6 business was very focused on transactions, on</p> <p>7 sales, how many transactions did you make, how</p> <p>8 many albums did you sell.</p> <p>9 Now, with an access model, we're much</p> <p>10 more focused on average revenue per user, ARPU.</p> <p>11 How much revenue are we able to collect per user</p> <p>12 for the use of the service and for the use of</p> <p>13 the content.</p> <p>14 Q. And can you just give us an example</p> <p>15 of what you mean when you say ARPU? Can you</p> <p>16 give us relative examples between the download</p> <p>17 business on the one hand and the streaming</p> <p>18 business on the other?</p> <p>19 A. Sure.</p> <p>20 So, you know, the ARPU for the</p> <p>21 download business on a wholesale basis is around</p> <p>22 \$50 a year that we receive from the consumer.</p> <p>23 For the paid subscription business, it's about</p> <p>24 \$70 a year. So if you look at that comparison,</p> <p>25 if we were able to shift the buyers all into the</p>
373	<p>1 don't have a direct relationship?</p> <p>2 A. Ultimately, they're a critical part</p> <p>3 of the overall ecosystem. It -- you know,</p> <p>4 clearly, there are a lot of music consumers in</p> <p>5 the statutorily licensed services and</p> <p>6 understanding what those music consumers are</p> <p>7 doing, what's important to them is critical for</p> <p>8 our business.</p> <p>9 Q. And how has this transition from an</p> <p>10 ownership model to more of an access or</p> <p>11 streaming model, how has that affected your</p> <p>12 ability to earn a return on the types of</p> <p>13 investments you described in creating and</p> <p>14 distributing content?</p> <p>15 A. Well, whenever you go through a</p> <p>16 transition, it's -- it is challenging. And, you</p> <p>17 know, what we have found in our industry is</p> <p>18 through each of the major transitions that we</p> <p>19 have gone through, that it is -- it is difficult</p> <p>20 to monetize the new direction that the consumer</p> <p>21 is going at a rate that is replacing faster the</p> <p>22 existing business that's declining.</p> <p>23 Q. And what measurement do you use</p> <p>24 within the Global Digital Business group to</p> <p>25 assess the type of return on investment that you</p>	375	<p>1 paid subscription world, we would have a growing</p> <p>2 business. But on the other side of it, of the</p> <p>3 paid business, is the ad-supported business.</p> <p>4 And the ad-supported ARPUs we estimate to be in</p> <p>5 about the \$4 range per year on a wholesale</p> <p>6 basis.</p> <p>7 Q. And when you say the ad-supported</p> <p>8 side of the business, what are you talking about</p> <p>9 there?</p> <p>10 A. Well, I'm talking about services that</p> <p>11 have -- that offer a free-to-the-consumer</p> <p>12 product that is monetized through advertising.</p> <p>13 Q. And are you including within that</p> <p>14 description and within the ARPUS that you</p> <p>15 describe of \$4 a year, both directly-licensed</p> <p>16 partners and those who operate under the</p> <p>17 statutory license?</p> <p>18 A. Yes, I am.</p> <p>19 Q. Can you describe, Mr. Kooker, some of</p> <p>20 the -- I take it one of your goals in this</p> <p>21 business is trying to get people to move from</p> <p>22 the lower ARPU offering to a higher ARPU</p> <p>23 offering?</p> <p>24 A. Yes, it's critical.</p> <p>25 Q. And what challenges does Sony Music</p>

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<p style="text-align: right;">376</p> <p>1 face in trying to get consumers to move from a 2 lower ARPU offering to a higher ARPU offering? 3 A. Well, I think, first, you know, 4 it's -- it's challenging to convince a consumer 5 to open their wallet and pay for something that 6 is very similar to something that is available 7 to them for free. So, you know, convincing or 8 providing that value ad that gets consumers to 9 open their wallet is critical and difficult. 10 Q. Okay. And why do you say that there 11 is competition for free? 12 A. I'm sorry? 13 Q. I'm sorry. 14 You said that it's difficult to get 15 people to pay for something that is very similar 16 to what they're getting for free? 17 A. Right. 18 Q. What is -- why do you think -- 19 explain what that difficulty is. 20 A. Well, I think when you look at many 21 of the ad-supported offerings out there, you 22 know, the service that is provided to the 23 consumer is near on demand, and it's also 24 provided with a very low ad load. And so the 25 differentiation that most paid services have,</p>	<p style="text-align: right;">378</p> <p>1 that favorite type of music that they're looking 2 at. 3 Q. And what are you seeing conversed on 4 the non-directly licensed ad-supported statutory 5 site? What are you seeing in terms of the types 6 of functionality that's being offered on the 7 on-demand or director license side of the 8 business? 9 A. Well, what we're seeing is that there 10 is definitely a move towards more of editorial 11 and programming within those services. 12 Ultimately, there's a lot of debate about lean- 13 forward-type versus lean-back-type experiences. 14 And my experience in working this business for 15 20 years is that music consumers are usually 16 both. There is an element of lean forward and 17 an element of lean back for every consumer, even 18 the most avid music consumer, at times, wants a 19 lean-back experience. And so the 20 subscription -- paid subscription services have 21 been focused on building out their capabilities 22 to provide what is a great lean-back experience 23 to complement that lean-forward experience that 24 they provide. 25 JUDGE STRICKLER: Excuse me. A</p>
<p style="text-align: right;">377</p> <p>1 which is removing ads, and it's -- is lost. And 2 having a near or having the ability to have an 3 on-demand experience and having a near on-demand 4 experience in the ad-supported tiers means that 5 it's -- it's, again, very difficult to convince 6 the consumer to pay an upgrade. 7 Q. And your written testimony, this is 8 your written direct testimony, describes a 9 number of examples of -- you called convergence 10 or also the sort of the blurring of 11 differentiation lines. 12 Can you just give some examples to 13 describe what you mean by that, sir? 14 A. Sure. 15 Well, I think, first, you know, what 16 we see in ad-supported tiers and especially, I 17 think, in the statutory license services is, you 18 know, a customization of what is played for the 19 consumer, a customization that the consumer is 20 able to -- to steer through favoriting [sic] or 21 disliking certain content, an experience that 22 the consumer is able to steer by including 23 favorite artists, by including favorite songs, 24 and, as a result, also often having, you know, 25 their playlists or algorithm then front loading</p>	<p style="text-align: right;">379</p> <p>1 question for you, sir. 2 You say it's your experience in the 3 music business that consumers are both lean back 4 and lean forward. What is the foundation for 5 that? Is it anecdotal in the course of your 6 business, or are you relying on your 7 recollection of particular research or studies 8 to come to that conclusion? 9 THE WITNESS: Probably more anecdotal 10 in just the way -- I mean, we have a lot of 11 information about consumer behavior, and we look 12 at, for example, what people are doing within 13 our paid subscription services and understanding 14 that a lot of the growth in place is happening 15 within playlists. Understanding that new 16 entrants are coming into the market where 17 they're focused -- their marketing angle is that 18 they're -- you know, they're focused on human 19 curation because, ultimately, they believe 20 that -- that, you know, consumers are looking 21 for a better curation experience within these 22 paid services. 23 JUDGE STRICKLER: I want to explore 24 just a little bit more your answer with regard 25 to my question about anecdotal. I mean, because</p>

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380	<p>1 we have other witnesses who will be coming in on</p> <p>2 both sides who are licensee with regard to</p> <p>3 consumer surveys and consumer preferences and</p> <p>4 the like.</p> <p>5       So your testimony in that regard, is</p> <p>6 that based on your recollection of surveys and</p> <p>7 studies you have seen, or you say you have a</p> <p>8 knowledge or an understanding of how consumers</p> <p>9 feel generally? And I'm trying to find out what</p> <p>10 is the foundation for that conclusion? So I</p> <p>11 guess my question, really, is: Where does that</p> <p>12 anecdotal -- what is the basis for that</p> <p>13 anecdotal.</p> <p>14       THE WITNESS: Well, I do know from</p> <p>15 research, which I may not be able to</p> <p>16 specifically reflect the exact research at this</p> <p>17 point, but I do know from research that</p> <p>18 lean-back experiences are very, very important</p> <p>19 to consumers. But in addition to that, I also</p> <p>20 know the information on the data that we receive</p> <p>21 from the services, themselves, and it's clear</p> <p>22 that, you know, when people have the ability to</p> <p>23 have everything they want on demand, that that</p> <p>24 play listing and curation remains an incredibly</p> <p>25 critical part.</p>	382
381	<p>1       In research that we do discovery is</p> <p>2 an incredibly important part of the consumer</p> <p>3 experience with music, and that discovery is</p> <p>4 usually prompted in some way by either word of</p> <p>5 mouth from friends or social media or from what</p> <p>6 the services, themselves, are presenting to</p> <p>7 consumers, and consumers often rate services</p> <p>8 more positively or negatively based on that</p> <p>9 discovery experience.</p> <p>10       JUDGE STRICKLER: So, then, your</p> <p>11 anecdotal evidence is based on your experience</p> <p>12 in the industry having reviewed data and</p> <p>13 reviewed research?</p> <p>14       THE WITNESS: Yes.</p> <p>15       JUDGE STRICKLER: To come to that</p> <p>16 conclusion?</p> <p>17       THE WITNESS: Yes.</p> <p>18       JUDGE STRICKLER: Thank you, sir.</p> <p>19       MR. KLAUS: Thank you, Judge.</p> <p>20       BY MR. KLAUS:</p> <p>21       Q.   Maybe I can close the loop on this</p> <p>22 just so there is no confusion in the record.</p> <p>23       When you say, "anecdotal," are you --</p> <p>24 is that something that's sort of a casual</p> <p>25 mention that you've heard, or are you basing</p>	383
	<p>1 this on data research reporting?</p> <p>2       A.   Data research and recording. I keep</p> <p>3 making the mistake of if I can't speak to the</p> <p>4 specific research of saying that it's more</p> <p>5 anecdotal.</p> <p>6       Q.   Okay. Also, you --</p> <p>7       MR. KLAUS: Do you have any other</p> <p>8 questions, Your Honor?</p> <p>9       JUDGE STRICKLER: No.</p> <p>10       MR. KLAUS: Thank you.</p> <p>11       BY MR. KLAUS:</p> <p>12       Q.   Mr. Kooker, I think one of the things</p> <p>13 you also described as moving in differentiation</p> <p>14 between statutory services and your</p> <p>15 directly-licensed partners in this space is the</p> <p>16 phenomenon of mobile?</p> <p>17       A.   Yes.</p> <p>18       Q.   And contents on mobile.</p> <p>19       Could you please describe that?</p> <p>20       CHIEF JUDGE BARNETT: Tilt that mic</p> <p>21 over, please.</p> <p>22       BY MR. KLAUS:</p> <p>23       Q.   Mr. Kooker, could you describe what's</p> <p>24 going on in your development space?</p> <p>25       A.   Yeah. Well, again, when we talk</p>	

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384	<p>1 as a result of the convergence, the lack of</p> <p>2 differentiation that you've described, what are</p> <p>3 you seeing as a result in the marketplace in</p> <p>4 terms of your ability to move consumers from low</p> <p>5 ARPU offerings to higher ARPU offerings?</p> <p>6 A. Well, in particular, we're seeing</p> <p>7 that it is very challenging to move people into</p> <p>8 paid subscription, and -- and I know that</p> <p>9 because I look at our benchmarks around the</p> <p>10 world. And so if you compare the U.S. market,</p> <p>11 which is, again, 72 percent digital with a</p> <p>12 market that has a similar ratio of</p> <p>13 digital/physical like Sweden where it's 82</p> <p>14 percent digital, in the U.S., we only have 3</p> <p>15 percent penetration on paid subscription</p> <p>16 business; whereas, in Sweden, we have 20</p> <p>17 percent.</p> <p>18 To flip that, if you look at a market</p> <p>19 like Germany, which is a late adopter market,</p> <p>20 only 24 percent of our revenue in Germany is</p> <p>21 digital. However, the same 3 percent</p> <p>22 penetration on subscription we have in the</p> <p>23 German market as we have in the U.S. market.</p> <p>24 Q. What conclusions have you drawn from</p> <p>25 your knowledge of this global basis about</p>	386	<p>1 part of the awareness building process, to</p> <p>2 hopefully get a small number of people to</p> <p>3 convert and actually go out and purchase an</p> <p>4 album at the time of release.</p> <p>5 When you think about the way that the</p> <p>6 access model and the access business is</p> <p>7 structured, ultimately, our revenue is driven by</p> <p>8 the consumption, itself; and therefore, the most</p> <p>9 valuable content is, therefore, the most popular</p> <p>10 most in demand content. And so shifting from,</p> <p>11 you know, thinking about making that content</p> <p>12 available to the consumer to drive to a sale</p> <p>13 actually is a completely wrong way to think</p> <p>14 about the access model. Ultimately, the</p> <p>15 consumption is the end game and shifting the way</p> <p>16 that we handle our promotion to drive people to</p> <p>17 that revenue-bearing consumption activity is</p> <p>18 incredibly important.</p> <p>19 Q. And your prior answer referred to</p> <p>20 promotion with Terrestrial radio as part of the</p> <p>21 awareness building process.</p> <p>22 What do you mean by that?</p> <p>23 A. Well, one of the things that we need</p> <p>24 to do whenever a new release is coming out from</p> <p>25 an artist is get the public to be aware that the</p>
385	<p>1 development within the U.S. market?</p> <p>2 A. Right.</p> <p>3 What we do know is that ad-supported</p> <p>4 services that have a high level of consumption</p> <p>5 like YouTube are common in all of these markets.</p> <p>6 One big differentiator is large ad-supported</p> <p>7 services through statutory license services,</p> <p>8 which we don't have in the other markets.</p> <p>9 Q. Mr. Kooker, there has been a lot of</p> <p>10 -- there will be -- there has been, there will</p> <p>11 be a lot of discussion about issues of motion</p> <p>12 and substitution in these proceedings. You</p> <p>13 discussed this in your testimony and written</p> <p>14 testimony. If you could describe, in general,</p> <p>15 for the judges what your experience the shift</p> <p>16 from the ownership to the access model has meant</p> <p>17 to Sony Music for purposes of concepts like</p> <p>18 promotion and substitution?</p> <p>19 A. Well, I think as it relates to</p> <p>20 promotion, it's something that we're still</p> <p>21 getting our arms around, because, in reality, it</p> <p>22 requires complete reengineering of our business.</p> <p>23 The way that we historically have gone to market</p> <p>24 is to focus on promotion at Terrestrial radio,</p> <p>25 taking our best content, making it available as</p>	387	<p>1 music is even in the marketplace, and</p> <p>2 Terrestrial radio, historically, has been one of</p> <p>3 the pieces to a marketing and promotion plan in</p> <p>4 building that awareness.</p> <p>5 Q. What are some of the other pieces of</p> <p>6 that awareness building plan?</p> <p>7 A. Publicity, social media, having</p> <p>8 artists perform on television within television</p> <p>9 programs, touring as well for certain artists is</p> <p>10 incredibly important.</p> <p>11 Q. And in terms of what you described as</p> <p>12 the new focus on promoting and driving people to</p> <p>13 revenue bearing, revenue-generating consumption</p> <p>14 activity, what have you seen in your analysis of</p> <p>15 the marketplace evidence that tells you that --</p> <p>16 what does that tell you about statutory</p> <p>17 services, free ad-supported offerings driving</p> <p>18 consumers to higher ARPU offerings?</p> <p>19 A. We have very little evidence that</p> <p>20 shows that ad-supported offerings that aren't</p> <p>21 directly linked to an upsell paid subscription</p> <p>22 tier have -- are driving people into other</p> <p>23 services that have paid subscription tiers.</p> <p>24 MR. KLAUS: Your Honor, I'm about to</p> <p>25 turn to -- for the last part of my</p>

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388	<p>1 examination -- material that's been designated</p> <p>2 restricted. This would be a good time to --</p> <p>3 CHIEF JUDGE BARNETT: Thank you, Mr.</p> <p>4 Klaus.</p> <p>5 If there is anyone in the courtroom</p> <p>6 who is not a party to a protective order or who</p> <p>7 has not signed a non-disclosure certificate,</p> <p>8 please wait outside. And will the last person</p> <p>9 out move the closed session sign to the outside</p> <p>10 of the door when you close it.</p> <p>11 Thank you.</p> <p>12 MR. KLAUS: Your Honor, the</p> <p>13 restricted information that I'm going to</p> <p>14 describe is entirely the property of Sony Music.</p> <p>15 Sony Music's counsel is in the courtroom. May</p> <p>16 they stay?</p> <p>17 CHIEF JUDGE BARNETT: Yes.</p> <p>18 MR. KLAUS: Thank you.</p> <p>19</p> <p>20 (THIS ENDS PUBLIC SESSION)</p> <p>21 (RESTRICTED SESSION BOUND SEPARATELY)</p> <p>22</p> <p>23</p> <p>24</p> <p>25</p>	409
408	<p>1 (THIS BEGINS PUBLIC SESSION)</p> <p>2</p> <p>3 CROSS-EXAMINATION BY COUNSEL FOR NAB</p> <p>4 BY MR. STURM:</p> <p>5 Q. Good morning, Mr. Kooker.</p> <p>6 I'm Michael Sturm. I represent NAB,</p> <p>7 and we met at your deposition.</p> <p>8 A. Good morning.</p> <p>9 Q. I understand you have been with Sony</p> <p>10 for about 11 years; is that right?</p> <p>11 A. No. I've been with Sony Music and</p> <p>12 its predecessors for almost 20 years.</p> <p>13 Q. Are you also on the RIAA board?</p> <p>14 A. I am, yes.</p> <p>15 Q. And how long have you been on that</p> <p>16 board?</p> <p>17 A. Probably five years.</p> <p>18 Q. Do you have your written direct</p> <p>19 testimony, which is Exhibit 12, in the big</p> <p>20 binder, not the one I just gave you?</p> <p>21 And, actually, do you have the cross</p> <p>22 exhibits?</p> <p>23 A. No.</p> <p>24 Q. Okay.</p> <p>25 A. Well, unless they're in this binder.</p>	410



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411	<p>1 Q. Is that in a -- is that part of the</p> <p>2 business that reports to you?</p> <p>3 A. Yes. The inventory team reports --</p> <p>4 is part of my group, yes.</p> <p>5 Q. How about -- then you go on to</p> <p>6 manufacturing and distribution costs. Excuse</p> <p>7 me. Go on to the marketing and promotion.</p> <p>8 Does that area report to you?</p> <p>9 A. No. The marketing and promotion from</p> <p>10 the labels does not report to me.</p> <p>11 Q. At the bottom of Page 4, carrying</p> <p>12 over to Page 5, you say: "The marketing plan</p> <p>13 for any project that generally include a variety</p> <p>14 of components and promotion and eliciting social</p> <p>15 media, live tour support, video promotion, and</p> <p>16 grand sponsorship, as well as traditional media</p> <p>17 like print and TV advertising."</p> <p>18 Do you see that testimony?</p> <p>19 A. I do, yes.</p> <p>20 Q. So you don't mention radio promotion</p> <p>21 in that sentence, right?</p> <p>22 A. No, I don't.</p> <p>23 Q. Okay. But you are certainly -- as</p> <p>24 you indicated in your direct testimony, you're</p> <p>25 aware that Sony promotes on radio, right?</p>	413	<p>1 that was filed in this case that there are</p> <p>2 currently well over a hundred employees in the</p> <p>3 radio promotion departments at Sony Music's</p> <p>4 major labels, you wouldn't have any basis to</p> <p>5 question that testimony, would you?</p> <p>6 A. No, I wouldn't.</p> <p>7 Q. Page 9 of your written direct</p> <p>8 testimony mentions -- I don't know that you</p> <p>9 necessarily need to flip through it for this</p> <p>10 question, but it mentions that there used to be</p> <p>11 six major record companies in the U.S.?</p> <p>12 A. Yes.</p> <p>13 Q. Okay. And, today, we're down to</p> <p>14 three: You, Warner, and Universal, correct?</p> <p>15 A. Yes.</p> <p>16 Q. And Sony's music -- Sony's share of</p> <p>17 the market, according to Page 3 of your</p> <p>18 testimony, is 28.2 percent for CDs and 26.5</p> <p>19 percent for digital albums; is that right?</p> <p>20 A. Right.</p> <p>21 Q. And Universal is greater than that,</p> <p>22 right? Did I misread something?</p> <p>23 MR. KLAUS: No. I was checking to</p> <p>24 see if you were getting into restricted</p> <p>25 testimony. My apologies.</p>
412	<p>1 A. I am aware of that, yes.</p> <p>2 Q. And I think on direct you mentioned</p> <p>3 that historically you have promoted through</p> <p>4 radio, but, in fact, Sony still promotes through</p> <p>5 the radio, right?</p> <p>6 A. That's correct.</p> <p>7 Q. And you still, in fact, spend more</p> <p>8 money on radio than any other kind of promotion,</p> <p>9 right?</p> <p>10 A. I'm not sure.</p> <p>11 Q. You don't know one way or the other?</p> <p>12 A. Not definitively, no.</p> <p>13 Q. Is it your belief that you do spend</p> <p>14 the most on radio?</p> <p>15 A. No. We spend quite a bit on video</p> <p>16 promotion, as well.</p> <p>17 Q. Do you know Julie Swidler?</p> <p>18 A. I do, yes.</p> <p>19 Q. She works with you?</p> <p>20 A. Yes, she does.</p> <p>21 Q. And she is the executive vice</p> <p>22 president, business affairs and general counsel</p> <p>23 for Sony?</p> <p>24 A. Correct.</p> <p>25 Q. Okay. If she said in a declaration</p>	414	<p>1 BY MR. STURM:</p> <p>2 Q. So, is it your understanding</p> <p>3 Universal's market share is even bigger than</p> <p>4 yours?</p> <p>5 A. Yes, it is.</p> <p>6 Q. Okay. And Warner is a little bit</p> <p>7 smaller?</p> <p>8 A. Yes.</p> <p>9 Q. Now, you were involved -- I think you</p> <p>10 testified on direct that you have approved the</p> <p>11 majority of the direct license deals; is that</p> <p>12 right?</p> <p>13 A. Yes.</p> <p>14 Q. Okay. And are you -- are you</p> <p>15 personally involved to some extent in the</p> <p>16 negotiation of those direct deals?</p> <p>17 A. It depends. It depends on the size</p> <p>18 of the deal and the nature of the deal how</p> <p>19 involved my -- how directly involved I am in</p> <p>20 that specific negotiation.</p> <p>21 Q. So you're more involved in bigger</p> <p>22 deals; is that fair?</p> <p>23 A. Tend to be, yeah.</p> <p>24 Q. And that's -- over what period of</p> <p>25 time have you been either negotiating or</p>

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415	<p>1 approving these direct deals?</p> <p>2 A. Over the past three-and-a-half years.</p> <p>3 Q. And over all that time, you, Sony,</p> <p>4 have never lowered your proposed rate in</p> <p>5 response to a proposed -- a proposal by another</p> <p>6 major label, correct?</p> <p>7 A. No.</p> <p>8 Q. You're saying you have never lowered</p> <p>9 it, or that's incorrect?</p> <p>10 A. Sorry. Never lowered it. We're not</p> <p>11 negotiating with our competitors.</p> <p>12 Q. Okay. So you have never lowered your</p> <p>13 proposed rate to another service in response to</p> <p>14 a proposal by another major label, correct?</p> <p>15 A. I don't know proposals from the other</p> <p>16 major labels.</p> <p>17 Q. Well, do the -- when you're</p> <p>18 negotiating these prospective licensees, do they</p> <p>19 ever tell you we've got a proposal from another</p> <p>20 label that's better than yours? Does that ever</p> <p>21 happen?</p> <p>22 A. It always happens.</p> <p>23 Q. Okay. And have you ever -- have you</p> <p>24 ever lowered your rate in response to such a</p> <p>25 statement by a proposed licensee?</p>
416	<p>1 A. Absolutely not.</p> <p>2 Q. And you have also never lowered your</p> <p>3 proposed rate in order to get more plays from</p> <p>4 another service, correct?</p> <p>5 A. No.</p> <p>6 Q. So you've never cut the price that</p> <p>7 you're offering, either, to respond to a</p> <p>8 competitor label's price or to get more plays</p> <p>9 for Sony, correct?</p> <p>10 A. I have never cut -- we've never cut</p> <p>11 our price responding to a competitor's proposal</p> <p>12 or for more plays.</p> <p>13 Q. Could you look, please, again at your</p> <p>14 written direct testimony, Page 15?</p> <p>15 You have it there?</p> <p>16 A. Yes.</p> <p>17 Q. Okay. I'm looking at the second</p> <p>18 paragraph from the bottom, the one that starts</p> <p>19 "as noted."</p> <p>20 Do you see it there?</p> <p>21 A. I do, yes.</p> <p>22 Q. Okay. So you say in here -- this is</p> <p>23 the second sentence -- "One of the original</p> <p>24 justifications for allowing statutory services</p> <p>25 to pay these lower rates was that the offering</p>
417	<p>1 under the statutory license would provide a user</p> <p>2 experience similar to Terrestrial radio."</p> <p>3 Did I read that correctly?</p> <p>4 A. Yes, you did.</p> <p>5 Q. Okay. And so -- and you're saying</p> <p>6 you have knowledge of that fact and you're</p> <p>7 declaring it is true under penalty of perjury,</p> <p>8 right?</p> <p>9 A. I have a general understanding that</p> <p>10 this is the part of the justification, yes.</p> <p>11 Q. Then the next -- so nothing to</p> <p>12 contradict that, right? You believe that to be</p> <p>13 true?</p> <p>14 A. I believe that to be true.</p> <p>15 Q. All right. Then the next two</p> <p>16 sentences in that paragraph, you set up a</p> <p>17 dichotomy. You say: "Statutory services could</p> <p>18 offer channels of particular musical genres, but</p> <p>19 the programming can be selected by the service."</p> <p>20 And that's -- that's on -- those kind</p> <p>21 of services get the most statutory rate, right?</p> <p>22 A. Right.</p> <p>23 Q. And if listeners wanted to select</p> <p>24 their programming, they would have to pay for it</p> <p>25 through a directly-licensed service. So that is</p>
418	<p>1 the higher direct license rate, right?</p> <p>2 A. Right.</p> <p>3 Q. Okay. And that's the intent of the</p> <p>4 law as you understand it, correct?</p> <p>5 A. Yes.</p> <p>6 Q. Could you flip back one page in your</p> <p>7 written direct to Page 14, please?</p> <p>8 This is the last full paragraph.</p> <p>9 You're talking about advertising and -- I'm</p> <p>10 sorry. It's the paragraph above -- paragraph</p> <p>11 that starts "we found."</p> <p>12 You say: "While there has been some</p> <p>13 growth in recent years in the advertising on</p> <p>14 streaming services, neither of the amounts that</p> <p>15 advertisers pay nor the average time that</p> <p>16 services run advertisements are on par with the</p> <p>17 corresponding dollar amounts and number of ads</p> <p>18 per hour on Terrestrial radio."</p> <p>19 Do you see that testimony?</p> <p>20 A. I do, yes.</p> <p>21 Q. And I assume that your testimony on</p> <p>22 that point is based on your experience in the</p> <p>23 business, right?</p> <p>24 A. And publicly-available information on</p> <p>25 the subject.</p>

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419	<p>1 Q. Okay. So let's focus on the first 2 part of that, the amounts that advertisers pay. 3 Your testimony is that the amounts advertisers 4 are willing to pay is less Webcasting than it is 5 on Terrestrial radio, correct? 6 A. No, I don't believe that's what my 7 testimony is focused on. It's focused on the 8 amount of advertisements that are run per hour. 9 Q. Well, no. There's two parts of this 10 statement, right? It says: "Neither the 11 amounts that the advertisers pay nor the average 12 time that servicers run advertisements." Okay? 13 So I'm going to focus on the first 14 part of that statement. 15 A. Right. 16 Q. Okay. So neither the amounts that 17 advertisers pay. So the typical measure of what 18 advertisers are willing to pay is CPM, right? 19 A. Yeah, that's an element of measure, 20 yes. 21 Q. Okay. And what does that stand for? 22 Is it cost per thousand impressions, right? 23 A. Yes. 24 Q. And CPMs are significantly lower on 25 Webcasting than they are on terrestrial radio,</p>	421	<p>1 will be sold, right? 2 A. I assume that they would be sold if 3 they could, yes. 4 Q. You calculate in the paragraph just 5 below that -- you calculate an ARPU for 6 advertising for Pandora of 642 annually. 7 Do you see that? 8 A. Yes. 9 Q. So that's \$0.53 a month? 10 A. Right. 11 Q. And it wouldn't surprise you if the 12 ARPU for simulcasters was even less than that, 13 correct? 14 A. It is possible. 15 Q. Well, did you testify at your 16 deposition that that wouldn't surprise you if 17 that were true? 18 A. I may have, yes. 19 Q. And you've read your deposition 20 recently, haven't you? 21 A. Uh-huh. 22 CHIEF JUDGE BARNETT: I'm sorry. Mr. 23 Kooker, could you answer "yes" or "no" to the 24 question? 25 THE WITNESS: Yes. Sorry.</p>
420	<p>1 correct? Is that your understanding? 2 A. I don't know about significantly, but 3 I believe they're lower, yes. 4 Q. And you believe that it's because 5 advertising budgets haven't yet started to 6 support Webcasting the way they support 7 terrestrial radio, correct? 8 A. That may be part of the reason. 9 Q. And that -- that's your 10 understanding, right? 11 A. That may be part of the reason. 12 Q. So, now, let's go to the second part 13 of that statement, the lower -- sort of the 14 lower inventory aspect of it. That part is not 15 applicable to simulcast, right? So we're 16 focusing here on the average time that services 17 run ads or are willing to run ads. And you say 18 that it is lower for statutory services than it 19 is for Terrestrial radio, right? 20 A. Right. 21 Q. Okay. So, at that point, it's not 22 applicable to Terrestrial radio, right -- excuse 23 me -- to simulcasting because the ad breaks are 24 already -- are there built in, right? So if 25 they can be sold on simulcast, presumably, they</p>	422	<p>1 BY MR. STURM: 2 Q. So you don't have any specific data 3 on that point from simulcasting, correct? 4 A. No, I don't. 5 Q. Now, I take it that your position is 6 that streaming has, to some extent, taken away 7 digital sales. Is that fair to say? 8 Cannibalizing? 9 A. I think streaming is having an impact 10 on digital sales, yes. 11 Q. Would you say that streaming is 12 cannibalizing digital sales? 13 A. I would say streaming is having a 14 substitutional effect. Again, we're going 15 through a transition. 16 Q. Do you not agree with that term 17 "cannibalizing"? You don't use that one? 18 A. No, I don't use it because it usually 19 -- people try to make a direct correlation with 20 cannibalization and saying that one service is 21 harming another service, and I don't think it's 22 that straightforward. 23 Q. And you don't have any evidence to 24 support that kind of cannibalization, correct? 25 A. What kind of cannibalization?</p>

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423	<p>1 Q. What you just spoke about, that one 2 service is harming another? 3 A. Yeah. No, we do have evidence of 4 that. 5 Q. You spoke at the MIDEM conference in 6 September 2012, right? 7 A. I did, yes. 8 Q. Okay. That's an industry music 9 conference? 10 A. It is, yes. 11 Q. Could you get the other binder -- 12 A. Sure. 13 Q. -- and look at Exhibit 4176? NAB 14 4176. 15 A. Yes. 16 Q. And you have seen this article 17 before, haven't you? 18 A. I have, yes. 19 Q. And that's your picture there? 20 A. That is my picture. 21 Q. All right. And you're quoted as 22 saying in the second paragraph, beginning in the 23 second paragraph: "We are constantly watching 24 our business very closely and looking how 25 different channels are affecting and impacting</p>	425	<p>1 question was asked and my response to that 2 question. 3 MR. STURM: Thank you, Your Honor. 4 No further questions. 5 CHIEF JUDGE BARNETT: Thank you. 6 Before we go further, let's take our 7 morning recess. Fifteen minutes. 8 (A short recess was taken.) 9 CHIEF JUDGE BARNETT: Mr. Larson. 10 MR. LARSON: Thank you, Your Honor. 11 CROSS-EXAMINATION BY COUNSEL FOR 12 PANDORA MEDIA, INC. 13 BY MR. LARSON: 14 Q. Mr. Kooker, good morning. 15 A. Good morning. 16 Q. I'm Todd Larson here representing 17 Pandora Media. 18 Do you recall that I was at your 19 deposition? 20 A. I do, yes. 21 Q. I'd like to turn to Page 19 and 20 of 22 your written testimony, if you could. And I'll 23 tell you, if it's easier, it is in the smaller 24 book. There's a tab called SX12? 25 A. This one.</p>
424	<p>1 each other. At this point, we don't see any 2 evidence that any one area is significantly 3 cannibalistic to another. Is there 4 substitution? There is always going to be some 5 as people move around and have choice. At this 6 point, there is no evidence that any one model 7 is seriously damaging any other model." 8 Is that the statement that you made 9 at that conference? 10 A. That's the statement I made to a 11 question that was asking about subscription 12 streaming services. 13 MR. STURM: I move the admission of 14 Exhibit 4176. 15 MR. KLAUS: No objection. 16 CHIEF JUDGE BARNETT: 4176 is 17 admitted. 18 (NAB Exhibit 4176 was admitted into 19 evidence.) 20 BY MR. STURM: 21 Q. And at the time you made this 22 statement in 2012, Pandora and SiriusXM and 23 simulcasting were all Webcasting at that time, 24 right? 25 A. They were, but that wasn't what the</p>	426	<p>1 Q. You describe on 19 and 20 what you 2 call the substitutional impact of streaming, 3 correct? 4 A. Yes. 5 Q. And you include a chart that -- 6 showing that download sales for top tracks were 7 less in 2014 than in 2013; is that correct? 8 A. Yes. 9 Q. But you have presented no evidence 10 that statutory Webcasting is the cause of the 11 declining sales data in Figure 20, correct? 12 A. Correct. 13 Q. Let me ask you to turn in your binder 14 to Pan Exhibit 57. 15 A. Yes. 16 Q. And I'll represent that this was 17 produced in discovery in this case. And I 18 believe Mr. Pomerantz used a portion of this in 19 his opening. 20 Do you recognize this document? 21 A. I do recognize it, yes. 22 MR. KLAUS: And, Your Honor, I'm 23 sorry. I don't mean to interrupt Mr. Larson. 24 But we are in open session still, I 25 believe. And the document was designated</p>

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427	<p>1 restricted. I just want to make sure you're</p> <p>2 aware of that.</p> <p>3 MR. LARSON: I -- and my recollection</p> <p>4 is that the page that I'm going to talk about</p> <p>5 was showed in the open session.</p> <p>6 MR. POMERANTZ: I don't know which --</p> <p>7 I believe I gave it in a notebook to the judges,</p> <p>8 but I did not directly refer to it.</p> <p>9 MR. KLAUS: That's correct.</p> <p>10 MR. LARSON: Okay. I'll hold that,</p> <p>11 and then we'll have a restricted session, and</p> <p>12 I'll deal with that document. Thank you.</p> <p>13 BY MR. LARSON:</p> <p>14 Q. Let me direct you to Page 8 of your</p> <p>15 testimony Mr. Kooker. And in the bottom two</p> <p>16 paragraphs of the page, I'll just read a couple</p> <p>17 of sentences.</p> <p>18 You say: "While revenue from</p> <p>19 physical product has been shrinking, revenue</p> <p>20 from digital product has increased but nowhere</p> <p>21 near a level sufficient to close the gap caused</p> <p>22 by plummeting physical sales."</p> <p>23 Do you see that?</p> <p>24 A. I do, yes.</p> <p>25 Q. And then in the following paragraph,</p>	429	<p>1 Q. And do you mean to suggest by that</p> <p>2 though that they should sell more?</p> <p>3 A. In an ideal world, yes, they would</p> <p>4 sell more.</p> <p>5 Q. But are you saying they should sell</p> <p>6 more?</p> <p>7 A. I'm saying that it would be preferred</p> <p>8 if they sold more.</p> <p>9 Q. Have you presented any evidence in</p> <p>10 your testimony that Pandora could sell more ads</p> <p>11 if it wanted to?</p> <p>12 A. I have not provided that evidence,</p> <p>13 no.</p> <p>14 Q. And do you have any evidence as to</p> <p>15 what would happen to Pandora's user base if it</p> <p>16 ran as many ads as terrestrial radio?</p> <p>17 A. I assume that it would have an impact</p> <p>18 on their user base.</p> <p>19 Q. And that impact would be negative,</p> <p>20 correct?</p> <p>21 A. Yes.</p> <p>22 Q. Have you presented any evidence that,</p> <p>23 if Pandora chose to run more ads per hour, it</p> <p>24 would cause users to chose to subscribe to the</p> <p>25 ad-free version of Pandora instead?</p>
428	<p>1 looking at the first sentence, again you mention</p> <p>2 the gap between declining physical sales,</p> <p>3 correct?</p> <p>4 A. Yes.</p> <p>5 Q. Is it your view that it's the</p> <p>6 responsibility of statutory Webcasters such as</p> <p>7 Pandora to close the gap caused by plummeting</p> <p>8 physical sales?</p> <p>9 A. I don't know that it's their</p> <p>10 responsibility to close the gap, but they are an</p> <p>11 important part of the overall revenue ecosystem</p> <p>12 of the business.</p> <p>13 Q. But you're not suggesting it should</p> <p>14 be on their shoulders to close the gap?</p> <p>15 A. Not solely, no.</p> <p>16 Q. And you observed on Page 14 that</p> <p>17 Pandora's ad load is less than terrestrial</p> <p>18 radio; is that right?</p> <p>19 A. Correct.</p> <p>20 Q. And do you mean that as a criticism</p> <p>21 that Pandora should be selling more ads than it</p> <p>22 is?</p> <p>23 A. Well, I mean it as a statement of</p> <p>24 fact, that -- that they do sell fewer ads than</p> <p>25 terrestrial radio.</p>	430	<p>1 A. No. We've not done that research.</p> <p>2 Q. Now, on Page 14, which is where you</p> <p>3 discuss ad load, you also note that Pandora's</p> <p>4 subscription revenues are too low, correct?</p> <p>5 And I'll direct you to the bottom</p> <p>6 paragraph if that's helpful.</p> <p>7 A. Yes.</p> <p>8 Q. All right. Have you presented any</p> <p>9 evidence in your testimony of what would happen</p> <p>10 to Pandora's subscriber levels if it were to</p> <p>11 raise its subscription fee?</p> <p>12 A. No, I did not.</p> <p>13 Q. Have you provided any evidence in</p> <p>14 your testimony that there is a meaningful group</p> <p>15 of users who are willing to pay to subscribe to</p> <p>16 Pandora above and beyond those who currently</p> <p>17 subscribe?</p> <p>18 A. No. No evidence in my testimony</p> <p>19 specific to Pandora.</p> <p>20 Q. Now, you indicated in your direct</p> <p>21 testimony that, if Sony's revenue didn't cover</p> <p>22 costs, you'd invest less in your business and</p> <p>23 have to control costs; is that right?</p> <p>24 A. Correct.</p> <p>25 Q. And it's true, is it not, that, if</p>

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431	<p>1 your revenues stayed the same but your costs</p> <p>2 went up, you'd also have to control costs and</p> <p>3 have less to invest in the business?</p> <p>4 A. Controlling cost is a key element to</p> <p>5 running a business, yes.</p> <p>6 Q. Your testimony discusses in various</p> <p>7 places the concepts of ARPU, correct?</p> <p>8 A. Yes, it does.</p> <p>9 Q. That's average revenue per user?</p> <p>10 A. Average revenue per user, yes.</p> <p>11 Q. And Sony takes a share in some form</p> <p>12 of that average-revenue-per-user earnings by the</p> <p>13 various services with whom you have licenses?</p> <p>14 A. Yes. On the subscription side of the</p> <p>15 business, yes.</p> <p>16 Q. And what is your -- Sony's ARPU from</p> <p>17 terrestrial radio?</p> <p>18 A. Sony's ARPU from terrestrial radio is</p> <p>19 zero.</p> <p>20 Q. And what is Sony's ARPU from pirated</p> <p>21 music services?</p> <p>22 A. The same. Zero.</p> <p>23 Q. You mentioned that you have a team</p> <p>24 that works with the top 20 digital providers; is</p> <p>25 that right?</p>	433
432	<p>1 A. Yes, I did.</p> <p>2 Q. How many of those people are assigned</p> <p>3 to the Pandora account?</p> <p>4 A. None.</p> <p>5 Q. All right. Do you have a view,</p> <p>6 sitting here, of how much of Sony's revenue is</p> <p>7 represented by Pandora royalties?</p> <p>8 A. Honestly, not off the top of my head.</p> <p>9 Q. About 10 percent, do you think? Does</p> <p>10 that sound about right?</p> <p>11 A. Honestly, I don't know off the top of</p> <p>12 my head.</p> <p>13 Q. Let me direct you to Page 15 of your</p> <p>14 testimony.</p> <p>15 Now, you say here in heading B that</p> <p>16 statutory services compete head to head with</p> <p>17 interactive services, correct?</p> <p>18 A. Yes.</p> <p>19 Q. And then this section generally</p> <p>20 discusses your claim that statutory and</p> <p>21 interactive service are conversion; is that</p> <p>22 right?</p> <p>23 A. Yes.</p> <p>24 Q. Let's look over at Page 16, the</p> <p>25 paragraph that starts with "Customized radio."</p>	434

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435	<p>1 and interactive services offer curated 2 playlists? 3 A. Yes. 4 Q. If a statutory Webcaster offers a 5 curated playlist, does that allow the user to 6 select and listen to a particular song on 7 demand? 8 A. No, it doesn't. 9 Q. An on-demand service offering a 10 curated playlist, the user can see every track 11 on that playlist in advance, correct? 12 A. Yes, they can. 13 Q. Again, just returning to confirm to 14 the heading in paragraph B on Page 15, you say 15 Webcasters compete head to head with on-demand 16 services. 17 A. Yes. 18 Q. You've presented no empirical 19 evidence in your testimony that statutory 20 Webcasting acts as a substitute for on-demand 21 services like Spotify? 22 A. No known empirical evidence. 23 Q. And you've presented no evidence your 24 testimony of consumers' willingness to pay for 25 on-demand services, correct?</p>	574	<p>1 (THIS BEGINS PUBLIC SESSION) 2 CHIEF JUDGE BARNETT: Please be 3 seated. 4 Before you sit, sir, please raise 5 your right hand. 6 DARIUS VAN ARMAN, 7 being first duly sworn, to tell the truth, the 8 whole truth and nothing but the truth, testified 9 as follows: 10 MR. POMERANTZ: Your Honor, before we 11 begin with Mr. Van Arman, I just want to 12 introduce -- I think the last two members of our 13 team, Mr. Kuruvilla Olasa and Rachel June 14 Draper. 15 CHIEF JUDGE BARNETT: Thank you. 16 Welcome. 17 MR. RICH: And, in turn, Your Honor, 18 on our team, Mr. Yolkut, to my left, will be 19 doing the cross-examination of this witness. 20 CHIEF JUDGE BARNETT: Okay. Thank 21 you. 22 And before we begin, if you could 23 state your name for the record, spelling first 24 and last time. 25 THE WITNESS: My name is Darius Van</p>
436	<p>1 A. No. 2 Q. And no evidence as to how many 3 consumers are willing to actually pay the \$10 4 price that's currently charged by on-demand 5 services? 6 A. Not in my testimony, no. 7 MR. LARSON: I think at this point, 8 Your Honor, I'm moving to the restricted 9 material. 10 CHIEF JUDGE BARNETT: Okay. Ladies 11 and gentlemen, you know the drill. 12 (THIS ENDS PUBLIC SESSION) 13 (RESTRICTED SESSION BOUND SEPARATELY) 14 15 16 17 18 19 20 21 22 23 24 25</p>	575	<p>1 Arman. My first name is spelled D-A-R-I-U-S. 2 My last name is spelled V-A-N-A-R-M-A-N. 3 CHIEF JUDGE BARNETT: Thank you. 4 MR. POMERANTZ: Your Honor, may I 5 approach to hand out the books for this witness? 6 CHIEF JUDGE BARNETT: Sure. 7 MR. POMERANTZ: Very thin. 8 DIRECT EXAMINATION BY COUNSEL FOR 9 SOUNDEXCHANGE 10 BY MR. CHOUDHURY: 11 Q. Good afternoon, Mr. Van Arman. 12 What do you do for a living? 13 A. So I am one of the owners and founder 14 of Secretly Group, which is a group of 15 independent labels based out of Indiana and -- 16 with offices, as well, in New York and in 17 London. And the labels that comprise Secretly 18 Group are Dead Oceans, Jagjaguwar, Secretly 19 Canadian, and The Numero Group. We also have 20 affiliated companies that have some common 21 ownership, SC Distribution, which is a 22 distributor; Fort William Artist Management, and 23 Secretly Canadian Publishing. 24 Q. And what are your responsibilities at 25 Secretly Group? A. So, you know, typical of many</p>

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576	<p>1 independent labels, my responsibilities are not 2 only dealing with the macro planning of our 3 business, but I'm also involved in a lot of the 4 project management and artist development. Some 5 specific roles I have is I handle our business 6 affairs and our information technology efforts. 7 Q. And how long have you worked in the 8 music industry? 9 A. Since 1996. 10 Q. So, what did you do when you first 11 got involved in the music industry? 12 A. So -- you know, at the very, very 13 beginning of when I got involved I was actually 14 in school at the University of Virginia and 15 taking classes, but also working many different 16 jobs on top of it. And one job that I, you 17 know, had when I was at -- in Charlottesville at 18 the University of Virginia was I did overnights 19 at a home for assisted living for mentally 20 handicapped adults. And how I got in the music 21 industry was -- well, I was doing an overnight 22 and a blizzard happened in '95 or '96 in 23 Charlottesville, which isn't typical for 24 Charlottesville. And I was stuck at this home 25 for many days, and I got a lot of overtime.</p>	578	<p>1 Bloomington, Indiana. And we started to become, 2 you know, phone pals, and, you know, few years 3 later he said, hey, you know, want to be 4 partners? And I said, yes. And he says, well, 5 you have to move to Bloomington. And so I moved 6 to Bloomington, Indiana in 1999. 7 Q. So, Mr. Van Arman, can you explain to 8 the judges how the Secretly Canadian -- Secretly 9 Group of today compares to that Jagjaguwar of 10 1996? 11 A. So, in 1996, it was just myself, you 12 know, releasing records out of my bedroom. In 13 '99, when I moved to Bloomington, Indiana, it 14 was just four of us, initially, sharing an 15 office and one computer, one fax line, and one 16 e-mail account. Now we're approximately 70 17 employees between all the labels and the 18 affiliated companies and we have offices in 19 Bloomington, Indiana, New York City, London, 20 Austin, and Chicago. 21 Q. And about how many artists do you 22 work with now? 23 A. We currently work with about 60 24 active artists between the three labels; Dead 25 Oceans, Jagjaguwar, and Secretly Canadian. And</p>
577	<p>1 And, at the time, my housemate was in a band, 2 had recorded a record and couldn't find a label. 3 So using this, you know, found money, I helped 4 him put out his first record. 5 Q. And that was the first Secretly 6 Canadian record? 7 A. No. The first Jagjaguwar record. So 8 I founded Jagjaguwar in Charlottesville, you 9 know. Then, you know, started slowly to find 10 other artists that were near Charlottesville and 11 in Virginia and also helped book a tour for this 12 first band that was on Jagjaguwar called The 13 Curious Digits. And in booking the tour, I 14 wasn't a booking agent. It was a horribly 15 routed tour, you know. The average drives of 16 ten hours between, you know, each show, and the 17 shows were in Bloomington, Indiana, and 18 Rochester, New York, Arlington, Virginia, and a 19 city in West Virginia. 20 And when this first artist of ours, 21 Jagjaguwar, was in Bloomington, they stayed at 22 just someone who had offered at a show to put 23 them up who eventually became my partner, Chris 24 Swanson, who, with his partners, had started 25 Secretly Canadian at the same time in</p>	579	<p>1 many more are reissued on Numero Group which 2 focused on works in the past. 3 Q. How many sound recordings does the 4 Secretly Group release each year? 5 A. If I had to estimate between those 6 four labels, many hundreds, probably approaching 7 a thousand copyrights a year. 8 Q. Besides your work at Secretly Group, 9 are you, otherwise, involved in the music 10 industry? 11 A. Yes. 12 Recently, I have become involved in 13 some bodies -- you know, organizational bodies 14 that have -- that represent independent 15 interests. For example, I am a board member of 16 Merlin, a non-voting observer of the Merlin 17 board. I am a founding council member of the 18 Worldwide Independent Network, which is an 19 umbrella organization that, you know, networks 20 all the different independent label trade 21 organizations in each country. I used to be and 22 am currently running again to be on the board of 23 A2IM, which was -- which is a -- the American 24 Independent Label Trade Organization, sort of 25 the independent counterpart to the RIAA here in</p>



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580	<p>1 the United States of America. And I have, you</p> <p>2 know -- I'm also on the board of SoundExchange.</p> <p>3 Recently, about three years ago, I became the</p> <p>4 independent seat or one of the independent seats</p> <p>5 representing the independent perspective on the</p> <p>6 SoundExchange board.</p> <p>7 Q. So in all of these boards, do you</p> <p>8 ever encounter other independent record</p> <p>9 companies?</p> <p>10 A. Yes, quite frequently.</p> <p>11 Q. And do you talk with them about their</p> <p>12 business?</p> <p>13 A. Yes.</p> <p>14 Q. And let me ask you: I think you</p> <p>15 mentioned earlier that Secretly Group also has a</p> <p>16 distribution company; is that right?</p> <p>17 A. Yes.</p> <p>18 So we have -- one of the affiliated</p> <p>19 companies to Secretly Group is SC Distribution,</p> <p>20 which is an international distributor. SC</p> <p>21 Distribution distributes not only the four</p> <p>22 Secretly Group labels that I have a -- you know,</p> <p>23 an ownership stake in, but also, you know,</p> <p>24 approximately 40 to 45 other labels that I have</p> <p>25 no ownership stake in at all. We're -- you</p>	582	<p>1 going to pay that to you, but we're going to</p> <p>2 take a distribution cut for doing the</p> <p>3 distribution work.</p> <p>4 Q. So in Secretly Group negotiates with</p> <p>5 digital services, are you involved in those</p> <p>6 negotiations?</p> <p>7 A. Yes.</p> <p>8 Q. And, you know, are you -- okay. Are</p> <p>9 you involved in those locations -- are you also</p> <p>10 involved in the actual negotiations talking with</p> <p>11 the digital services?</p> <p>12 A. Sometimes. So, you know, our</p> <p>13 businesses, we have a small business affairs</p> <p>14 team. So much of the time our general counsel</p> <p>15 is having those conversations. We sometimes</p> <p>16 also rely on collective licensing where we're</p> <p>17 not part of the negotiations, but we can review</p> <p>18 a fully negotiated deal and decide whether to</p> <p>19 opt in or opt out of it. In the past, we have</p> <p>20 relied on the agreements of a major, that they</p> <p>21 have negotiated when we were distributed</p> <p>22 digitally by a major recording company.</p> <p>23 Q. So let's go through that. So</p> <p>24 Secretly Group sometimes negotiates directly</p> <p>25 with the digital music service, right? That's</p>
581	<p>1 know, when talking about SC Distribution, it's</p> <p>2 a -- it's an independent distributor that is</p> <p>3 competing with other independent distributors</p> <p>4 and the major distribution arms.</p> <p>5 Q. So when you're distributing the other</p> <p>6 independent record labels, are you privy to</p> <p>7 information about their businesses?</p> <p>8 A. Yes.</p> <p>9 Q. And do you communicate with them</p> <p>10 about their sound recordings?</p> <p>11 A. Yes.</p> <p>12 Q. And when you say that you distribute</p> <p>13 them what do you mean by that?</p> <p>14 A. So a distributor, you know -- a</p> <p>15 distributor enters into agreements with rights</p> <p>16 holders, whether it's a label or an artist and</p> <p>17 says, you know, hey, we will, you know,</p> <p>18 distribute your recordings whether they're in</p> <p>19 physical form or digitally throughout the world.</p> <p>20 We're going to send your product, you know,</p> <p>21 through our distribution network. We're going</p> <p>22 to enter into digital service agreements with</p> <p>23 your content. We're going to collect all the</p> <p>24 revenue that stems from the sales or the</p> <p>25 exploitation of your copyrights and then we're</p>	583	<p>1 one way you distribute?</p> <p>2 A. Yes.</p> <p>3 Q. You reference collective licensing.</p> <p>4 What is that?</p> <p>5 A. So collective licensing, one of the</p> <p>6 organization that I am an observer on called</p> <p>7 Merlin, that's an example of an agency that</p> <p>8 collectively negotiates on behalf of its</p> <p>9 membership, and Merlin's membership are</p> <p>10 independent labels and independent distributors.</p> <p>11 And so when something is collectively</p> <p>12 negotiated, an agency such as Merlin goes to a</p> <p>13 digital service and tries to work out what</p> <p>14 Merlin thinks is a commercially reasonable</p> <p>15 agreement with that service. And after</p> <p>16 negotiating with the service and coming to some</p> <p>17 agreement, approaches its membership and says,</p> <p>18 hey, we collectively negotiated this on behalf</p> <p>19 of our membership, would you like to opt in or</p> <p>20 opt out of this agreement?</p> <p>21 Q. Mr. Van Arman, why would an</p> <p>22 independent record company like the Secretly</p> <p>23 Group label, why would they want to work for</p> <p>24 Merlin?</p> <p>25 A. So, you know, even though we're one</p>

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584	<p>1 of the larger independent companies, labeled</p> <p>2 groups in the United States, we often have a</p> <p>3 difficulty getting access to a negotiation.</p> <p>4 Some digital services won't really negotiate</p> <p>5 with us. They will provide us</p> <p>6 take-it-or-leave-it deals often at the eleventh</p> <p>7 hour. And so even for a company our size, we</p> <p>8 have seen that when a license is collectively</p> <p>9 negotiated, the terms that are offered to us</p> <p>10 that we can opt into are more favorable than</p> <p>11 what we can achieve on our own.</p> <p>12 Q. And I believe you mentioned that you</p> <p>13 were, at one point, digitally distributed</p> <p>14 through a major; is that right?</p> <p>15 A. Correct.</p> <p>16 Q. What major was that?</p> <p>17 A. Warner Music Group.</p> <p>18 Q. And why would you license your sound</p> <p>19 recordings through a major?</p> <p>20 A. Well, at the time when we were a</p> <p>21 smaller company we didn't really have an option.</p> <p>22 We needed some help with distribution, physical</p> <p>23 distribution, and part of our distribution</p> <p>24 agreement with Warner Music Group was that they</p> <p>25 required our digital distribution.</p>	586	<p>1 digital streaming. They report that revenue</p> <p>2 back to you and then they take a cut before</p> <p>3 they, you know, pay all that revenue to you.</p> <p>4 Q. So we have talked about distributing</p> <p>5 through SC Distribution, and collective</p> <p>6 licensing through Merlin, and distributing</p> <p>7 through a major.</p> <p>8 Are you aware of any other ways that</p> <p>9 independent record companies distribute their</p> <p>10 recordings to digital music services?</p> <p>11 A. Well, you know, you said, you know,</p> <p>12 distribute through a major through a company</p> <p>13 like SC Distribution. Some -- and maybe you</p> <p>14 said this, but I didn't hear this, Anjan. Some</p> <p>15 -- you know, some labels and artists distribute</p> <p>16 directly. You know, they will try to build up</p> <p>17 their own direct-to-consumer sales network.</p> <p>18 They might engage in negotiations directly with</p> <p>19 digital services and they don't rely on</p> <p>20 distributors or licensed bodies like Merlin to</p> <p>21 negotiate deals on their behalf.</p> <p>22 Q. I'm going to ask you to look at Tab 1</p> <p>23 of the black binder in front of you. Look at</p> <p>24 what has been marked as SoundExchange Trial</p> <p>25 Exhibit 0020.</p>
585	<p>1 I talk about this a little bit in my</p> <p>2 testimony. It was only for a few more labels</p> <p>3 that I had an ownership stake in that Warner</p> <p>4 Music Group digitally distributed; but, at the</p> <p>5 same time, for all the other labels that were</p> <p>6 distributed, we developed the ability, the</p> <p>7 capability to distribute and enter into digital</p> <p>8 service agreements on behalf of those labels.</p> <p>9 And so, you know, at some point recently, it was</p> <p>10 at the end of 2013, beginning of 2014, we were</p> <p>11 in a position with our relationship with Warner</p> <p>12 Music Group, they continued to distribute us</p> <p>13 physically but we were able to start digitally</p> <p>14 distributing our content directly.</p> <p>15 Q. And when you're distributing through</p> <p>16 a major, how does that relationship work? What</p> <p>17 do they do for you? What do you do for them?</p> <p>18 A. So when a major distributes our</p> <p>19 labels or any labels, it's the same thing as</p> <p>20 what SC Distribution does. They receive your</p> <p>21 physical product. They send it out into the</p> <p>22 marketplace. They digitally distribute your</p> <p>23 content. They collect from the revenue that's</p> <p>24 generated from the sales of the physical stock</p> <p>25 or the digital copies of your records or from</p>	587	<p>1 Do you recognize this document?</p> <p>2 A. I apologize. Which document again?</p> <p>3 Q. Behind Tab 1.</p> <p>4 A. Okay.</p> <p>5 Yes, I do recognize this document.</p> <p>6 Q. What is that document?</p> <p>7 A. This is my testimony that I put forth</p> <p>8 to the copyright royalty judges in the fall for</p> <p>9 this rate proceeding.</p> <p>10 Q. And did you prepare this testimony?</p> <p>11 A. Yes, I did.</p> <p>12 Q. Okay. If you could turn to the last</p> <p>13 page of that exhibit, is that your signature?</p> <p>14 A. Yes.</p> <p>15 Q. Is the information in your written</p> <p>16 testimony true and correct?</p> <p>17 A. Yes.</p> <p>18 MR. CHOUDHURY: At this time, I would</p> <p>19 move for admission of SoundExchange Trial</p> <p>20 Exhibit 0020.</p> <p>21 MS. VOLKMAR: Good afternoon, Your</p> <p>22 Honor.</p> <p>23 My name is Jillian Volkmar and I</p> <p>24 represent the National Association of</p> <p>25 Broadcasters, and we have a couple of objections</p>

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588	<p>1 to the admission of Mr. Van Arman's written 2 direct testimony. 3 CHIEF JUDGE BARNETT: Can you state 4 them? 5 MS. VOLKMAR: Sure. 6 So we object to Page 12, Paragraph 2, 7 which starts with "While I do not know the terms 8 of the major record company licenses with Apple 9 for its iTunes radio services, I suspect this is 10 essentially what happens." And we object to 11 that whole paragraph for a lack of foundation 12 and speculation. 13 CHIEF JUDGE BARNETT: Okay. And 14 other objections? 15 MS. VOLKMAR: If you turn to the next 16 page starting with the first paragraph, first 17 sentence: "Indeed, with respect to other 18 digital services, I have even heard discussion 19 of a negative Most Favored Nations," that whole 20 sentence for a lack of foundation and hearsay. 21 CHIEF JUDGE BARNETT: Others? 22 MS. VOLKMAR: That's it. 23 CHIEF JUDGE BARNETT: Thank you. 24 Do you want to respond? 25 MR. CHOUDHURY: Yes, Your Honor.</p>	590	<p>1 briefly? 2 CHIEF JUDGE BARNETT: You may. 3 MR. FAKLER: Thank you, Your Honor. 4 I would also just in supplement to 5 that note that both the regulations of the 6 Copyright Royalty Judges 351.4 and also the 7 statute, itself, in Section 803(b)(6)(C)(ii)(II) 8 does very clearly differentiate between 9 testimony -- when it's discussing the written 10 direct statement of the parties, for example, in 11 both of those places differentiates between the 12 testimony and the exhibits, both of much -- both 13 of which must be included within the written 14 regs. 15 Thank you. 16 CHIEF JUDGE BARNETT: Thank you. 17 MR. CHOUDHURY: And just briefly, of 18 course Your Honor knows what you all intended in 19 the April 9th order. But let me just add that, 20 as you well know, that when we filed objection 21 to the exhibits, including the written direct 22 testimony listed as exhibits, the services 23 responded by saying that our objections at that 24 time were untimely. They responded by saying 25 they were out of time, motion to strike. And</p>
589	<p>1 First, as a sort of threshold matter, 2 we believe that your April 9th order made clear 3 that any objections, outside of relevance, to 4 the admissibility of exhibits had to be stated 5 in the April 20th filings of the parties. This 6 written testimony and all of our written 7 testimony were exhibits. And, as you know, we, 8 of course, objected to the exhibits on the other 9 side. So we believe that these objections have 10 been waived. 11 In addition, I'm happy to respond to 12 the merits of either of the two objections. 13 MS. VOLKMAR: Given the clear CRB 14 regulations and consistent practice, we did not 15 understand and none of our co-services 16 understood the April 9th order, which 17 self-distinguished between testimony and 18 exhibits to require objections to testimony, 19 which we believe that CRB regulations at 37 20 C.F.R., Section 351, support our position that a 21 participant can object to testimony as it is 22 being offered during the course of the hearing. 23 MR. FAKLER: Excuse me, Your Honor? 24 CHIEF JUDGE BARNETT: Mr. Fakler? 25 MR. FAKLER: May I add something</p>	591	<p>1 that was on April 20th. 2 We received these objections after 3 midnight last night. And if there was a case 4 for waiver, I think this is -- this is a pretty 5 good case for waiver because the thought that 6 the judges made a very clear order that said 7 that what is on the exhibit list should be -- 8 that the objection should be filed by that date 9 except with respect to relevance, and that's not 10 the objections we're talking about here. The 11 services saw what SoundExchange did in response. 12 They saw that they noticed this written 13 testimony as exhibits at the time, and they, in 14 fact, admitted their own -- at least two of the 15 services, they made their own statement that 16 even SoundExchange's exhibits -- objections at 17 that time were out of time or waived. 18 CHIEF JUDGE BARNETT: The objection 19 is overruled. We will admit Exhibit 20, but we 20 certainly understand and can recognize 21 speculative testimony, hearsay testimony, 22 testimony not based on personal knowledge, and 23 we can weigh the testimony accordingly. 24 MR. CHOUDHURY: Thank you, Your 25 Honor.</p>

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592	<p>1 (SoundExchange Exhibit 0020 was 2 admitted into evidence.) 3 BY MR. CHOUDHURY: 4 Q. So, Mr. Van Arman, you know, the 5 judges are aware that I am a big fan of Katy 6 Perry, but I am also a big fan of indie labels. 7 Can you tell us about some of the 8 artists that are signed at Secretly Group? 9 A. For sure. 10 So our best selling artist is Bon 11 Iver, who worldwide we sold more than a million 12 records and they have gone gold. And two of 13 those records have gone gold, and he's won 14 multiple Grammy awards. Recently, winning at 15 best new artist, which is one of the major 16 Grammy awards. 17 We also released recordings by a 18 comedian named Tig Notaro, who was nominated 19 recently for best comedy album. And, you know, 20 her record, when it came out that year, was the 21 best selling comedy record in the world. 22 We also work with other artists that 23 are renowned and critically renowned, Dinosaur 24 Jr., who's an artist that's been around since 25 1994 creating, you know, what we think is a very</p>	594	<p>1 their recordings. 2 Q. And how does Secretly Group find 3 their artists? 4 A. Many different ways. You know, we 5 used to listen to every demo that came to our 6 companies and that, you know, it was a big 7 investment of time. We also get referrals from 8 the artists we work with. They say, hey, you 9 know, I went on tour and I played with this band 10 in Boston and I think you should check them out, 11 and they would put us in touch with artists that 12 they actually played with or knew, and so we 13 often discover artists from referrals. 14 We often get approached by managers 15 and lawyers who we work with already who say, 16 hey, we -- we're now representing another artist 17 that you should check out. We spent a lot of 18 time attending shows, at showcases where our 19 staff and myself were avid music fans. So we're 20 always listening to what's out there in the 21 marketplace, and so sometimes we also reach out 22 to an artist and say, hey, we would like to get 23 to know you and see if we can maybe work with 24 you. 25 Q. Can you think of an example of one of</p>
593	<p>1 vital important music. We also are about to 2 reissue the recordings of Yoko Ono. Some of her 3 classic records we're going to be bringing back 4 at the marketplace and repackaging them and 5 reintroducing them. 6 Q. And can you clarify -- you know, can 7 you elaborate for the judges what does The 8 Numero Group do? 9 A. The Numero Group focuses -- sort of 10 reissues and going back in time and finding 11 artists and recordings that maybe didn't receive 12 the attention they deserved when they came out 13 originally. And one example of a Numero Group 14 compendium or compilation is Purple Snow, the 15 Minneapolis Sound, which is a compilation of, 16 you know, obscure, soul, and R&amp;B artists from 17 Minneapolis just prior to Prince becoming 18 renowned for what he has contributed to our 19 musical landscape. 20 And so they really focus on finding 21 work that the public really haven't, you know, 22 spent a lot of time in, reconceptualizing them, 23 doing these exquisite liner notes and getting it 24 back out there for the public to get another 25 opportunity to learn about these artists and</p>	595	<p>1 these artists you discovered in this way? 2 A. One artist that we recently became 3 partners with is this artist name Angel Olsen. 4 And we -- this is an artist that we sort of 5 discovered in two different ways at the same 6 time. My -- one of my colleagues, John Coons, 7 who's a -- used to be a project manager and do 8 A&amp;R for us, he learned about her music from a 9 compilation that his friend put out, another 10 indie label in Chicago, and so she -- he heard 11 Angel Olsen's recording and his ears were perked 12 and he wanted to learn about more who she was 13 and see if we could maybe work with her. 14 At the very same time, there was an 15 artist that I worked with very early on, it was 16 our second Jagjaguwar artist, a gentleman named 17 Rick Alverson, who is now a movie director, and 18 he was, you know, shooting a movie and putting 19 together a trailer for that movie, and the 20 soundtrack to that trailer that he shared with 21 me over the Internet had Angel Olsen's voice on 22 it. And I got this trailer from Rick and 23 immediately I reached out to him and said, who 24 is this amazing voice. She sounds like Patsy 25 Cline, but Roy Orbison. This is a voice unlike,</p>

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<p style="text-align: right;">596</p> <p>1 you know, any voice I have heard. 2 And, you know, from there, you know, 3 he put me in touch with her. You both John and 4 I attended numerous shows that she performed in 5 New York City. I traveled to Chicago to sit 6 down with her. And, you know, we had a 7 conversation, it led to other conversations. 8 But we got a sense of whether we could work well 9 together. She learned about who we were. We 10 had an opportunity to learn about what she 11 wanted in a label, what kind of support she 12 wanted, and then we decided to work together. 13 Q. So let me ask you: -- you know, so 14 Ms. Olsen is now signed to the Secretly Group. 15 What do your record labels do to 16 support her recordings? 17 A. So we -- you know, first, one of the 18 objective ways we help the artists that we have 19 an opportunity to work with as we put together 20 recording funds, that's part of the agreements 21 we do with an artist, is we're going to fund 22 your recordings. And so we help in that 23 objective way, but part of that, too, is we have 24 a lot of conversations about how are you going 25 to record this record, and -- and we introduced</p>	<p style="text-align: right;">598</p> <p>1 independent community is a big community. But 2 more so than a major regarding companies, I 3 think independent labels have, you know, a 4 direct connection to their artists, and there's 5 more of a conversation about how the records are 6 going to be marketed. And they devote a lot of 7 time to really understanding, you know, the kind 8 of language that's specifically used and in 9 discussing these recordings and promoting the 10 artists, and it's in partnership with the 11 artist. 12 Q. So let me ask you: What is Secretly 13 Group's business model? 14 A. If we try to make a profit on the 15 majority of records we release -- you know, if 16 we release between the labels in Secretly Group, 17 40 releases a year, we want to -- our goal is to 18 make a profit on the majority of those releases. 19 Q. And why that model? 20 A. We just feel it's sustainable. We 21 feel -- you know, most of our agreements with 22 artists are net profit deals. So if, you know, 23 we are doing this in partnership with an artist, 24 you know, they're not going to get any 25 additional payment from us, in many cases,</p>
<p style="text-align: right;">597</p> <p>1 her to a producer name John Congleton, who we 2 felt like did exceptional work. He recently won 3 a Grammy. And they started communicating and 4 they realized that they could work well together 5 so they made the record. 6 Once we got the recording that they 7 created, we spent a lot of time talking with her 8 directly and her manager about how to introduce 9 this to the market, how to have her music become 10 discovered by fans all over the world. We 11 orchestrated press trips. We had her travel to 12 London, met her team there. We talked about 13 what kinds of videos we wanted. We funded those 14 videos, and we got a sense of exactly how she 15 wanted to approach the marketplace. And we did 16 our best to, you know, market the record and 17 maximize the revenues we could earn from these 18 recordings, while at the same time honoring her 19 vision for how she wanted her music presented to 20 the world. 21 Q. And, in your experience, is that 22 typical of how independent record companies 23 support their artists? 24 A. For many of the companies I know, 25 yes, there's a -- you know, there's a -- the</p>	<p style="text-align: right;">599</p> <p>1 unless we are profitable on one of their 2 releases. And so for us, that's a 3 responsibility that we take very seriously. And 4 so, for us, it's not a workable business model 5 to lose money on nine projects, but hit one out 6 of the ballpark and have a blockbuster that 7 keeps the lights on. We really want to have 8 sustainable budgets and be profitable on -- the 9 goal is on every release, but, obviously, that's 10 not always possible. So it's -- we try to make 11 sure we're profitable in the majority of our 12 releases. 13 Q. And so how did digital revenues play 14 into your business model? 15 A. Well, you know, early on, in 1996, we 16 are largely physically focused. It was all 17 about selling CDs and eventually -- also when we 18 could afford it, it was about selling vinyl, as 19 well. 20 Now, you know, a majority of our 21 revenues is from digital distribution of our 22 copyrights that we release in partnership with 23 our artists. So, for us, digital revenues are a 24 very critical part of the revenue that we depend 25 on to keep our lights on and keep doing the good</p>

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600	<p>1 work we're trying to do for ourselves and for</p> <p>2 our artists.</p> <p>3 Q. And, Mr. Van Arman, you compared</p> <p>4 today to 1996, but what about over the last five</p> <p>5 years? How have digital revenues changed or not</p> <p>6 changed in your business model?</p> <p>7 A. In the last five years, the digital</p> <p>8 revenues have become tripled and have become a</p> <p>9 majority of our revenue compared to physical.</p> <p>10 Right now, our digital revenues compared to our</p> <p>11 physical revenues represents, roughly, 65</p> <p>12 percent of the pie.</p> <p>13 Q. And when you say, "digital revenue,"</p> <p>14 what are you including?</p> <p>15 A. I'm including not only permanent</p> <p>16 downloads such as MP3s that one might purchase</p> <p>17 on the iTunes music store, but also the revenues</p> <p>18 that we receive from streaming services.</p> <p>19 Q. And when you say, "streaming</p> <p>20 services," what do you mean?</p> <p>21 A. So the streaming services, to name a</p> <p>22 few, is Spotify, Rdio, Rhapsody, you're talking</p> <p>23 the interactive streaming services where a</p> <p>24 consumer can choose exactly what they want to</p> <p>25 listen to on a track-by-track basis. And they</p>	602	<p>1 other ways that you can get value out of the</p> <p>2 deal other than the royalty rate.</p> <p>3 We, you know, have seen deals when,</p> <p>4 you know, where not just a royalty rate, but</p> <p>5 other things like guarantees an advances are</p> <p>6 offered where, you know, we receive compensation</p> <p>7 that isn't coming from actual performances or</p> <p>8 streams of our masters. It's -- for example, we</p> <p>9 could be offered, you know, half a penny per</p> <p>10 stream from a service who also says, you know,</p> <p>11 at the end of Year 1 we're going to give you</p> <p>12 \$100,000.</p> <p>13 Well, at the end of Year 1 -- excuse</p> <p>14 me, I should clarify. A hundred thousand</p> <p>15 dollars as a guarantee on what streams. And at</p> <p>16 the end of Year 1, our content has only streamed</p> <p>17 enough to generate \$50,000 of revenue, as an</p> <p>18 example. Well, they're guaranteed to pay us the</p> <p>19 minimum of \$100,000, so there's extra \$50,000</p> <p>20 we're going to receive as part of this deal and</p> <p>21 because that extra \$50,000 is not attributable</p> <p>22 to actual streaming of any recording, in a</p> <p>23 sense, it's found money. It's unattributable</p> <p>24 and we refer to that kind of money as breakage.</p> <p>25 And when we're considering the total</p>
601	<p>1 also include noninteractive services like</p> <p>2 iHeartRadio or Pandora or iTunes radio that</p> <p>3 don't give as much interactivity to the users.</p> <p>4 So those are some examples of streaming services</p> <p>5 who's revenue we rely on.</p> <p>6 Q. Now, in your testimony, Mr. Van</p> <p>7 Arman, you refer to a concept called "breakage."</p> <p>8 Can you explain what you mean by that</p> <p>9 term?</p> <p>10 A. Yes.</p> <p>11 When we're negotiating an agreement</p> <p>12 with a digital service or distributor that we</p> <p>13 rely on in the -- like when we worked with</p> <p>14 Warner Music Group or Merlin, when they</p> <p>15 negotiate a deal that we opt into, one aspect of</p> <p>16 an agreement is the headline royalty rate.</p> <p>17 It's, you know, basically what is offered as</p> <p>18 what you will receive in revenue for each stream</p> <p>19 that occurs.</p> <p>20 Sometimes in digital streaming deals,</p> <p>21 you're offered a lot of other things, and some</p> <p>22 of those things could be like an advance on the</p> <p>23 front end, a guarantee on the back end, a play</p> <p>24 share incentive, an equity stake, some</p> <p>25 promotional consideration. But there's lots of</p>	603	<p>1 value of a digital streaming deal, we consider</p> <p>2 the possibility of that breakage and that's part</p> <p>3 of our calculation whether a deal is a good deal</p> <p>4 for us.</p> <p>5 Q. So in your negotiations with digital</p> <p>6 services, how does breakage factor into your</p> <p>7 negotiations?</p> <p>8 A. Well, sometimes a digital service,</p> <p>9 you know, might approach an independent label</p> <p>10 like ours and propose a streaming rate of X, and</p> <p>11 we communicate with that streaming service that</p> <p>12 such royalty rate is not sufficient, that we're</p> <p>13 going to decline their offer.</p> <p>14 They might come back, the digital</p> <p>15 service, and say, okay, we can't adjust the</p> <p>16 royalty rate, but if X is a royalty rate is</p> <p>17 acceptable to you in the event that we can</p> <p>18 guarantee a certain amount of money at the end</p> <p>19 of Year 1 or end of Year 2, is that something</p> <p>20 you're more interested in?</p> <p>21 If we were to give you a guarantee of</p> <p>22 a hundred thousand dollars or a million dollars,</p> <p>23 would you consider moving forward with the</p> <p>24 royalty rate we offered?</p> <p>25 And that would be a sweeter deal for</p>

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604	<p>1 us than just a royalty rate without a guarantee.</p> <p>2 And so, as a company, we might decide, okay, we</p> <p>3 don't like the royalty rate, but they're</p> <p>4 guaranteeing some revenue, we'll proceed with</p> <p>5 this license.</p> <p>6 JUDGE STRICKLER: Excuse me, Mr. Van</p> <p>7 Arman.</p> <p>8 Have you ever been involved in a</p> <p>9 negotiation with a streaming service where you</p> <p>10 weren't able to come to terms, and therefore,</p> <p>11 you did not enter into an agreement with them?</p> <p>12 THE WITNESS: Yes.</p> <p>13 JUDGE STRICKLER: Does that happen</p> <p>14 regularly?</p> <p>15 THE WITNESS: It happens</p> <p>16 occasionally, yes.</p> <p>17 JUDGE STRICKLER: If you can, what</p> <p>18 percent of the time does that happen?</p> <p>19 THE WITNESS: For us -- you know, I</p> <p>20 am not involved directly in all of our</p> <p>21 negotiations, but of the three that I have been</p> <p>22 involved with, I would say we have passed on</p> <p>23 two.</p> <p>24 JUDGE STRICKLER: And how many have</p> <p>25 there been total for your organization, whether</p>	606	<p>1 those kinds of proposals, it's not hard for us</p> <p>2 to say, hey, it's actually better for us if we</p> <p>3 stuck with the statutory royalty rate, which is</p> <p>4 paying the higher rate.</p> <p>5 JUDGE STRICKLER: And how about the</p> <p>6 interactive market, the non-statutory market,</p> <p>7 have you passed on any licenses and negotiations</p> <p>8 with them?</p> <p>9 THE WITNESS: Yes.</p> <p>10 One such license is in my testimony.</p> <p>11 which I can't identify publicly, but yes.</p> <p>12 JUDGE STRICKLER: Thank you.</p> <p>13 MR. CHOUDHURY: If Your Honor wants</p> <p>14 to hear more about that, we just need to go into</p> <p>15 a closed session. I'm sure the witness will be</p> <p>16 happy to talk about it.</p> <p>17 JUDGE STRICKLER: We can wait.</p> <p>18 MR. CHOUDHURY: We were planning to</p> <p>19 sort of bring that up at the end and that way,</p> <p>20 we can keep the open session.</p> <p>21 BY MR. CHOUDHURY:</p> <p>22 Q. You also refer to play share</p> <p>23 incentives. Can you tell the judges what you</p> <p>24 mean by that?</p> <p>25 A. Sure. So for many noninteractive</p>
605	<p>1 or not you've been involved in? How many</p> <p>2 negotiations?</p> <p>3 THE WITNESS: That's a great</p> <p>4 question.</p> <p>5 And are you talking about all digital</p> <p>6 negotiations, whether streaming or download</p> <p>7 streams?</p> <p>8 JUDGE STRICKLER: Let's just do</p> <p>9 streaming.</p> <p>10 THE WITNESS: Just streaming.</p> <p>11 So we rely, for most of our digital</p> <p>12 streaming agreements, on Merlin's negotiation.</p> <p>13 So we have opted into a lot of Merlin deals.</p> <p>14 There are a few that we've opted out of. But</p> <p>15 there are a few that we have -- I would say, you</p> <p>16 know from off the top of my head, less than ten</p> <p>17 deals that we have done direct negotiations</p> <p>18 with. And of those less than ten deals, I think</p> <p>19 maybe a minority of them, two or three we've</p> <p>20 entered into deals.</p> <p>21 Often we've been approached by</p> <p>22 noninteractive services with direct licenses</p> <p>23 where they're offering us a rate that's lower</p> <p>24 than statutory rate that's available to us. And</p> <p>25 so, for us, you know, when we're thinking about</p>	607	<p>1 services, consumers really don't know how the</p> <p>2 music is getting to them. For some services,</p> <p>3 what is being played for consumers is, you know,</p> <p>4 seeded from an algorithm. Others are curated</p> <p>5 playlists. So it is sometimes not clear how</p> <p>6 content is getting streamed. And a play share</p> <p>7 incentive is when a digital service offers to a</p> <p>8 rights holder or label or an artist some sort of</p> <p>9 guarantee of air play.</p> <p>10 They might say, hey, normally, you</p> <p>11 are going to get X amount of streams on our</p> <p>12 service if you enter into this deal, we will do</p> <p>13 a ten percent uplift on that. Or they may say,</p> <p>14 we are going to guarantee that 25 percent of our</p> <p>15 plays are from your repertoire, but it's</p> <p>16 basically as part of a digital agreement</p> <p>17 negotiation, some sort of guarantee of the</p> <p>18 market share of listening or streams that are</p> <p>19 occurring from that service.</p> <p>20 Q. You know, do you think that play</p> <p>21 share incentives are healthy for the market?</p> <p>22 A. I have testified that it isn't good</p> <p>23 for the market in the long run.</p> <p>24 Q. Why is that?</p> <p>25 A. Personally, I feel it's a race to the</p>

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608	<p>1 bottom that, you know, it's something that not 2 everyone can receive, that there is going to be 3 a big advantage for a mover and those who move 4 later and agree to a play share incentive or 5 they may not even have a play share incentive 6 that's available to them, will not get, you 7 know, compensation to what the first movers are 8 getting, and so the first mover is going to want 9 to get in there first and it helps this dynamic 10 of driving down prices for what streaming 11 royalty rates should be, so I think in the long 12 run, it is not good for the market. You know, 13 in the short term, I can see how some companies 14 can get a short term benefit from it. 15 Q. Do you think play share incentives 16 affect the consumer's experience of music? 17 A. I think it does, because consumers 18 are not hearing music based on the merits of the 19 music or based on -- maybe the benevolent, 20 denying tastes of DJs, who are championing 21 artists for noncommercial reasons. What's 22 happening is commercial terms are dictating what 23 consumers are experiencing or listening to. 24 JUDGE STRICKLER: Mr. Van Arman, so 25 you said why you think they used play share is</p>	610	<p>1 years ago. 2 Q. Have you testified anywhere else? 3 A. I recently, part of the music 4 licensing reexamination, I was testifying in 5 front of Congress in June and which is about 6 ways that we thought from the independent 7 perspective, copyright laws should be revised. 8 JUDGE STRICKLER: We're probably 9 getting ahead of what you wanted to -- the 10 question is something that I'm curious about, 11 although you didn't believe this race to the 12 bottom was injurious to the marketplace, you 13 entered into one of these deals. Was your 14 purpose of entering into -- at least one of your 15 purposes of entering into that deal, to obtain 16 -- be the first mover, so that your company 17 could take advantage of the first mover 18 position? 19 THE WITNESS: Yes. And this was a 20 decision, you know, I can actually not name the 21 agreement and talk about it. This was a 22 decision that wasn't easy for us to come to, but 23 from our perspective, being a smaller company, 24 usually a company that is offered a take it or 25 leave it deal at the 11th hour, we are often not</p>
609	<p>1 that it would be a race to the bottom and 2 ultimately be destructive or at least injurious. 3 With that said, has any of your entities ever 4 had to deal with the play share incentive? 5 THE WITNESS: Yes. 6 JUDGE STRICKLER: How many? 7 THE WITNESS: Just one that I know 8 of. 9 JUDGE STRICKLER: Is that something 10 you can only talk about in restricted session? 11 THE WITNESS: No. I don't think it 12 is restricted. 13 JUDGE STRICKLER: Take your time so 14 you don't make a mistake. 15 MR. CHOUDHURY: Your Honor, we can go 16 into that. We were actually planning to, so we 17 will go back to that, too. 18 BY MR. CHOUDHURY: 19 Q. Just to clarify, Mr. Van Arman, you 20 said that you have testified. Did you mean 21 testified to these judges? 22 A. Well, I provided testimony and also 23 in a previous rate proceeding for satellite 24 radio, I also in my testimony talked about this 25 race to the bottom and this was about three</p>	611	<p>1 had the opportunity to be a first mover, it was 2 a defensive mechanism. By us being part of an 3 agreement with a play share incentive as a first 4 mover, it makes it harder for bigger companies 5 that normally are first movers to enter into 6 play share incentive deals with that same 7 digital service. 8 JUDGE STRICKLER: So it was a good 9 competitive move on your part? 10 THE WITNESS: It was in our 11 self-interest, yes. 12 BY MR. CHOUDHURY: 13 Q. On that note, I'm going to ask you to 14 turn to Page 14 of your written testimony. 15 Do you see that first paragraph, the 16 one that starts with pro rata terms? 17 A. Yes. 18 Q. Mr. Van Arman, when you wrote this 19 paragraph, who are you addressing? 20 A. The judges here. 21 Q. Were you writing to anyone else? 22 A. No. 23 Q. Are you aware that Pandora's 24 economist, Dr. Shapiro, has commented on this 25 portion of your written direct testimony?</p>



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612	<p>1 JUDGE STRICKLER: Which portion?</p> <p>2 MR. CHOUDHURY: The pro rata terms on</p> <p>3 Page 14, that paragraph.</p> <p>4 BY MR. CHOUDHURY:</p> <p>5 Q. Are you aware that Pandora's</p> <p>6 economist, Dr. Shapiro, has commented on this</p> <p>7 portion of your written direct testimony?</p> <p>8 A. Yes.</p> <p>9 Q. Do you know what he said?</p> <p>10 MR. YOLKUT: Your Honor, objection.</p> <p>11 This is clearly rebuttal testimony. Dr. Shapiro</p> <p>12 commented on the Merlin deal in the context of</p> <p>13 -- clearly in the context of rebuttal. It's</p> <p>14 beyond the scope of the rebuttal.</p> <p>15 MR. CHOUDHURY: Your Honor, if we may</p> <p>16 be heard, we understood that witnesses would be</p> <p>17 allowed to respond to the rebuttals of -- to the</p> <p>18 rebuttal testimony of other -- of other</p> <p>19 witnesses who were commenting on their written</p> <p>20 direct testimony. This is an instance where Dr.</p> <p>21 Shapiro is commenting directly on the written</p> <p>22 direct testimony of this witness, in which I am</p> <p>23 asking him if he has a response.</p> <p>24 MR. YOLKUT: We have a different view</p> <p>25 of Dr. Shapiro's testimony. It was not in</p>	614	<p>1 the revenue piracy from digital streaming, so</p> <p>2 they are important from a revenue perspective</p> <p>3 but they also affect our negotiations.</p> <p>4 Q. How do they affect your negotiations?</p> <p>5 A. Well, they -- when we are negotiating</p> <p>6 with a digital service who can avail themselves</p> <p>7 of the statutory license, it serves as a ceiling</p> <p>8 so if, you know, if we are trying to work out</p> <p>9 royalty rates, it's nearly impossible to get a</p> <p>10 royalty rate that's higher than the statutory</p> <p>11 rate.</p> <p>12 Q. Do they effect that your negotiations</p> <p>13 with services who are not eligible for the</p> <p>14 statutory license?</p> <p>15 A. Yes. There is a mention in my</p> <p>16 testimony, you know, sometimes, increasingly,</p> <p>17 services are offering products that have</p> <p>18 interactive and noninteractive elements, and so</p> <p>19 sometimes we are approached or what I provided</p> <p>20 in my testimony for a blanket rate between the</p> <p>21 interactive aspects and the noninteractive</p> <p>22 aspects and often the statutory royalty rate</p> <p>23 that is currently available to noninteractive</p> <p>24 services is used as a reference for what the</p> <p>25 blended rate should be.</p>
613	<p>1 connection with Mr. Van Arman's testimony.</p> <p>2 MR. CHOUDHURY: And Your Honor, I'll</p> <p>3 reference -- what I am asking about is what he</p> <p>4 -- what Dr. Shapiro was literally quoting the</p> <p>5 testimony and commenting on Mr. Van Arman, and</p> <p>6 only that.</p> <p>7 MR. YOLKUT: If it's clearly grounds,</p> <p>8 we can obviously cover on rebuttal with Mr. Van</p> <p>9 Arman.</p> <p>10 CHIEF JUDGE BARNETT: We are going to</p> <p>11 confer.</p> <p>12 (A short recess was taken.)</p> <p>13 CHIEF JUDGE BARNETT: We have some</p> <p>14 difficulty coming up with any qualitative</p> <p>15 difference between this circumstance and that</p> <p>16 one this morning. This relates to rebuttal</p> <p>17 testimony which means it is premature at this</p> <p>18 point.</p> <p>19 MR. CHOUDHURY: Thank you, Your</p> <p>20 Honor.</p> <p>21 BY MR. CHOUDHURY:</p> <p>22 Q. What role, if any, does statutory</p> <p>23 Webcasting royalties play in your business</p> <p>24 model?</p> <p>25 A. They are increasingly more and more</p>	615	<p>1 MR. CHOUDHURY: I'm going to try to</p> <p>2 do this actually without closing the session,</p> <p>3 but if Your Honors have any further questions, I</p> <p>4 am happy to do a restricted session.</p> <p>5 CHIEF JUDGE BARNETT: Thank you.</p> <p>6 BY MR. CHOUDHURY:</p> <p>7 Q. If you could turn to Page 16 of your</p> <p>8 written testimony.</p> <p>9 Is this the negotiation you were just</p> <p>10 discussing?</p> <p>11 A. Yes.</p> <p>12 Q. Also, I'm going to ask you to turn to</p> <p>13 Page 14 of your written testimony.</p> <p>14 Judge Strickler asked you earlier</p> <p>15 about whether you had ever signed a deal for a</p> <p>16 play share incentive.</p> <p>17 A. Yes.</p> <p>18 Q. Why would you sign a deal for a play</p> <p>19 share incentive?</p> <p>20 JUDGE STRICKLER: Is the question why</p> <p>21 would he or why did he?</p> <p>22 MR. CHOUDHURY: Why did he.</p> <p>23 JUDGE STRICKLER: Thank you.</p> <p>24 THE WITNESS: Well, one thing --</p> <p>25 there is some benefits that a statutory license</p>

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616	<p>1 provides us as indies. And one is a level 2 playing field that all copyrights are getting 3 the same compensation regardless of who the 4 rights holder is that is offering that copyright 5 to the service. In a direct license 6 environment, being a smaller company, and again, 7 you know, seeing what happens when we are last 8 in line to get an agreement done, we have to 9 sometimes be defensive and we have to, you know, 10 consider a play share incentive to protect what 11 is a limited revenue pie. In these new models 12 for streaming, there is only so much revenue to 13 be shared with rights holders, based either on 14 subscription revenue or ad revenue and the more 15 that some companies can get, because they are a 16 first mover, leaves not as much for everyone 17 else. And from the independent perspective, we 18 are often fighting for scraps on the table and 19 so in this instance that we entered into this 20 play share incentive agreement, we did so to 21 sort of protect our turf. We also, you know, 22 entered into this play share incentive agreement 23 not just as labels, but as a distributor. And I 24 think there is a qualitative difference there as 25 well.</p>	618
617	<p>1 the room except perhaps Your Honors know that 2 this Merlin and the Merlin Pandora agreement, 3 that is the subject of this witness's rebuttal 4 testimony and we actually share our colleague's 5 view, it's a proper point to do an issue with 6 respect to his perspectives on it, why they 7 entered into it and so forth, it's not 8 presently, but unless Your Honors view it 9 differently at the time we engage with this 10 witness on rebuttal. 11 CHIEF JUDGE BARNETT: Thank you, Mr. 12 Rich. 13 BY MR. CHOUDHURY: 14 Q. Let me ask you: If statutory royalty 15 revenues that you receive were cut in half, how 16 would that affect your business model? 17 A. I think it would have a very 18 significant affect on our budgeting and how we 19 see the future as an independent label. Right 20 now, we see -- we see it, you know, at some time 21 in the future, when streaming is going to exceed 22 download revenue and we actually can imagine 23 very soon where all the digital revenues, which 24 is most of the revenue pie now being streaming, 25 and we see also increasingly that revenues that</p> <p>1 When we entered into it as a 2 distributor, we gave the option to all the 3 labels we distribute whether they wanted to opt 4 in or opt out of it, and for a distributor to 5 decide to enter into a deal with a play share 6 incentive, their motivation is different. 7 It's really about providing options 8 to the labels that the distributors distribute. 9 MR. CHOUDHURY: Your Honors, we're 10 happy to go further here, but I suspect, I can 11 see Mr. Yolkut we will hear more about this in 12 this case and there will be another opportunity 13 to talk about this unless Your Honor wants to do 14 it more. 15 JUDGE STRICKLER: When you say more 16 to talk about this, you mean in his direct 17 testimony or someone else's direct testimony? 18 MR. CHOUDHURY: In his rebuttal 19 testimony. 20 JUDGE STRICKLER: That is a judgment 21 call that you have to make when you proffer his 22 rebuttal testimony. I have no idea what it is 23 to do. 24 MR. RICH: If I may be heard, Your 25 Honor, if I could demystify this. Everybody in</p>	619

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620	<p>1 through 2020, why would your concerns about</p> <p>2 profitability be different from 2017 to 2020</p> <p>3 than they are for 2016?</p> <p>4 THE WITNESS: It's our belief that</p> <p>5 the market is converging in a sense when it</p> <p>6 comes to streaming services, that more and more</p> <p>7 consumers are not making a distinction between</p> <p>8 noninteractive services and interactive</p> <p>9 services. You know, a consumer out there in the</p> <p>10 marketplace loves their playlist on Spotify.</p> <p>11 They love Pandora. Both services pay completely</p> <p>12 different rates for what is streamed, and when</p> <p>13 the distinction between those kinds of services</p> <p>14 become more muddy in the consumer's eyes, we</p> <p>15 could see that there is the possibility of a</p> <p>16 noninteractive having a significant</p> <p>17 substitutional affect, such that we will very</p> <p>18 quickly realize that the revenue that we are</p> <p>19 counting on coming to us so that we can be</p> <p>20 profitable for our artists and for ourselves is</p> <p>21 not there anymore.</p> <p>22 JUDGE STRICKLER: Are you saying, I</p> <p>23 think I understand you, that if the</p> <p>24 noninteractive rate was the predominant rate</p> <p>25 that was paid to you and that predominance</p>	622	<p>1 THE WITNESS: Yes.</p> <p>2 JUDGE STRICKLER: If the statutory</p> <p>3 rate was half and you'd see a substitution from</p> <p>4 interactive to noninteractive and it's your</p> <p>5 guess that that would eventually erode</p> <p>6 profits --</p> <p>7 THE WITNESS: Yes.</p> <p>8 JUDGE STRICKLER: -- leaving aside</p> <p>9 the question about downloads.</p> <p>10 THE WITNESS: Well, I think, you</p> <p>11 know, you have to keep in mind that the</p> <p>12 interactive royalty rates that we can negotiate</p> <p>13 will also be impacted, so even if, you know,</p> <p>14 noninteractive services don't start to</p> <p>15 substitute for interactive services in the</p> <p>16 consumer market, I provided in my testimony one</p> <p>17 example of where an interactive service was</p> <p>18 using what was existing statutory royalty rate</p> <p>19 to inform what the blended rate should be for</p> <p>20 their service, so we see, you know, from our</p> <p>21 perspective, the possibility that if the</p> <p>22 statutory royalty rate is diminished, that it</p> <p>23 could have a diminishing effect on what we can</p> <p>24 achieve in the marketplace for interactive</p> <p>25 services.</p>
621	<p>1 occurred over the statutory term, that would</p> <p>2 eventually erode and eliminate your profits?</p> <p>3 THE WITNESS: I think yes, that would</p> <p>4 be my guess.</p> <p>5 JUDGE STRICKLER: Your guess. Is it</p> <p>6 a matter of speculation?</p> <p>7 THE WITNESS: It has to be, because</p> <p>8 we don't know exactly, you know, what we are</p> <p>9 going to be budgeting in the future of what</p> <p>10 other kinds of revenues we're going to get in</p> <p>11 the future.</p> <p>12 JUDGE STRICKLER: That's the problem</p> <p>13 with the future, we just don't know it. But is</p> <p>14 there a projection?</p> <p>15 THE WITNESS: Yes, so we project that</p> <p>16 in the next five years, that our streaming</p> <p>17 income is going to be significantly more than</p> <p>18 our downloading income. We actually, some of us</p> <p>19 internally think that downloading kind of might</p> <p>20 disappear completely within the next ten years.</p> <p>21 JUDGE STRICKLER: That is a different</p> <p>22 cleave than what we were talking about. We were</p> <p>23 talking about noninteractive versus interactive.</p> <p>24 You are saying that it's your guess, to use your</p> <p>25 words, that you would see a substitution.</p>	623	<p>1 JUDGE STRICKLER: The deal that you</p> <p>2 are talking about where that read -- or that</p> <p>3 proposal was made up, the one on Page 16?</p> <p>4 THE WITNESS: Correct.</p> <p>5 JUDGE STRICKLER: And you ultimately</p> <p>6 rejected that.</p> <p>7 THE WITNESS: Yes.</p> <p>8 BY MR. CHOUDHURY:</p> <p>9 Q. Just to follow up on that, if you</p> <p>10 could turn to Tab 2 of your binder.</p> <p>11 Mr. Van Arman, if you could look at</p> <p>12 Tab 2.</p> <p>13 Do you know what this document is?</p> <p>14 A. Yes.</p> <p>15 Q. What is it?</p> <p>16 A. This is what was proposed to us that</p> <p>17 we were referring to on Page 16.</p> <p>18 MR. CHOUDHURY: Your Honors, at this</p> <p>19 time, I would move into evidence SoundExchange</p> <p>20 Trial Exhibit 39.</p> <p>21 MR. YOLKUT: No objection.</p> <p>22 MS. VOLKMAR: No objection.</p> <p>23 MR. FAKLER: No objection.</p> <p>24 MR. RICH: No objection.</p> <p>25 CHIEF JUDGE BARNETT: Exhibit 39 is</p>

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624	<p>1 admitted.</p> <p>2 (SoundExchange Exhibit No. 39 was</p> <p>3 admitted into evidence.)</p> <p>4 MR. CHOUDHURY: Unless the judges</p> <p>5 have any further questions, I have no further</p> <p>6 questions.</p> <p>7 MR. YOLKUT: Your Honors, would you</p> <p>8 like me to begin cross?</p> <p>9 CHIEF JUDGE BARNETT: I would like</p> <p>10 you to begin cross. At the end of the day</p> <p>11 yesterday, I announced we would be in session</p> <p>12 from 9 until 4:30 today, even though I continue</p> <p>13 to forget that we did announce a quit time of</p> <p>14 4:15. Starting tomorrow, 4:15 will be our quit</p> <p>15 time.</p> <p>16 So we're just going to tough it out</p> <p>17 today. But obviously, if we are in the middle</p> <p>18 of something and we can wrap it up, we will try</p> <p>19 to do that on any day except Wednesday, I have</p> <p>20 an appointment off campus on Wednesdays, so it</p> <p>21 has to be 4:15 on Wednesday.</p> <p>22 MR. YOLKUT: Your Honors, I have a</p> <p>23 number of mercifully skinny binders. May I</p> <p>24 approach?</p> <p>25 CHIEF JUSTICE BARNETT: Yes, please.</p>	626	<p>1 THE WITNESS: I think if I had to</p> <p>2 guess, I don't know exactly, but I would</p> <p>3 approximate -- that is a great question. It's</p> <p>4 different country to country, so you are</p> <p>5 probably most concerned about the United States.</p> <p>6 Maybe a third to half of the indie market share.</p> <p>7 JUDGE STRICKLER: Thank you.</p> <p>8 BY MR. YOLKUT:</p> <p>9 Q. And Mr. Van Arman, actually, on that</p> <p>10 point, if you could turn to Page 10 of SX 20</p> <p>11 which is your written direct testimony in this</p> <p>12 case.</p> <p>13 In the second sentence, you write:</p> <p>14 "Merlin negotiates on behalf of over 20,000</p> <p>15 independent label vendors in 39 countries."</p> <p>16 Does that help refresh your</p> <p>17 recollection as to how many independent label</p> <p>18 vendors Merlin negotiates on behalf of?</p> <p>19 A. Yes, that is a gross number but I was</p> <p>20 trying to answer like what proportion of</p> <p>21 indie --</p> <p>22 Q. Understood. The reason that these</p> <p>23 20,000 independent label members allow Merlin to</p> <p>24 negotiate on their behalf is to try to improve</p> <p>25 the terms that an independent company could get</p>
625	<p>1 MR. YOLKUT: Your Honor, may I</p> <p>2 proceed?</p> <p>3 CHIEF JUSTICE BARNETT: You may.</p> <p>4 CROSS-EXAMINATION BY COUNSEL FOR</p> <p>5 PANDORA</p> <p>6 BY MR. YOLKUT:</p> <p>7 Q. Good afternoon, Mr. Van Arman. My</p> <p>8 name is David Yolkut and I represent Pandora</p> <p>9 Media in this proceeding. I have a few</p> <p>10 questions for you.</p> <p>11 Mr. Van Arman, you testified that you</p> <p>12 were co-founder and co-owner of Secretly Group,</p> <p>13 which consists of four independent record</p> <p>14 companies, correct?</p> <p>15 A. Correct.</p> <p>16 Q. And you also sit on the board of</p> <p>17 Merlin as a nonvoting observer; is that right?</p> <p>18 A. Correct.</p> <p>19 Q. And Merlin is a global rights agency</p> <p>20 that collectively negotiates with various</p> <p>21 digital services on behalf of the independent</p> <p>22 record industry; is that right?</p> <p>23 A. Yes. Not the whole independent</p> <p>24 record label industry, but a significant portion</p> <p>25 of it.</p> <p>26 JUDGE STRICKLER: What portion of it?</p>	627	<p>1 negotiating on its own, right? I believe you</p> <p>2 testified to that on direct.</p> <p>3 A. Yes.</p> <p>4 Q. And, in fact, I believe you said that</p> <p>5 Merlin can get the independent record label more</p> <p>6 favorable terms than that label could get</p> <p>7 negotiating in and of itself, correct?</p> <p>8 A. That is often the case, yes.</p> <p>9 Q. And I believe you testified that it's</p> <p>10 conventional wisdom that when Merlin is able to</p> <p>11 collectively represent many independents and</p> <p>12 companies such as yours are in a better</p> <p>13 negotiating position as an independent company</p> <p>14 than if we all tried to negotiate separate</p> <p>15 deals, right?</p> <p>16 A. No, I wouldn't say conventional</p> <p>17 wisdom. There have been some Merlin agreements</p> <p>18 that we have seen and that we've opted out of.</p> <p>19 I also think sometimes independents negotiate</p> <p>20 directly with digital services and decide that</p> <p>21 what they've negotiated is better than what</p> <p>22 Merlin has accomplished.</p> <p>23 Q. Not to negate the point, Mr. Van</p> <p>24 Arman, but if you stay on Page 10, conventional</p> <p>25 wisdom, I was actually using your words.</p>

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628	<p>1 A. Okay.</p> <p>2 Q. Just point you to the first full</p> <p>3 paragraph about halfway down, you write: "The</p> <p>4 conventional wisdom is that when Merlin is able</p> <p>5 to collectively represent many independents,</p> <p>6 then we are in a better negotiating position</p> <p>7 than independent companies than if we all tried</p> <p>8 to negotiate separate deals on our own."</p> <p>9 That's your testimony, correct, sir?</p> <p>10 A. Yes.</p> <p>11 Q. And you signed this testimony as a</p> <p>12 sworn declaration, correct?</p> <p>13 A. Yes.</p> <p>14 Q. Now you also testified that you sit</p> <p>15 on SoundExchange's board; is that right?</p> <p>16 A. Yes.</p> <p>17 Q. Would you agree, Mr. Van Arman, that</p> <p>18 independent labels are a vibrant and vital part</p> <p>19 of the American music landscape?</p> <p>20 A. That's what I testified.</p> <p>21 Q. You have got some very prominent acts</p> <p>22 under your own independent company, correct?</p> <p>23 A. Yes.</p> <p>24 Q. You testified about Bon Iver, a</p> <p>25 multiple Grammy winner?</p>	630	<p>1 on what you mean by released. You're right,</p> <p>2 those artists are released on independent labels</p> <p>3 in some territories, not all territories.</p> <p>4 Q. When you say territories, do you mean</p> <p>5 countries?</p> <p>6 A. Countries, yes. But in the United</p> <p>7 States, those are -- Adele I think is released</p> <p>8 on a major, but the other two artists you</p> <p>9 mentioned are released on independent --</p> <p>10 Q. Taylor, Taylor Swift and Paul</p> <p>11 McCartney?</p> <p>12 A. Exactly.</p> <p>13 Q. And independent labels that artists</p> <p>14 -- I believe you testified won over half of the</p> <p>15 2014 Grammy awards; is that right?</p> <p>16 A. Yes.</p> <p>17 Q. And according to Nielsen's figures</p> <p>18 that you cite in your direct testimony, even</p> <p>19 independently owned repertoire constituted over</p> <p>20 a third of the market for music sales; is that</p> <p>21 right?</p> <p>22 A. According to Nielsen and Billboard,</p> <p>23 yes.</p> <p>24 Q. Let me show you SoundExchange 469,</p> <p>25 which is in your binder.</p>
629	<p>1 A. Yes.</p> <p>2 Q. And Tig Notaro, who is a Grammy</p> <p>3 nominee last year, correct?</p> <p>4 A. Correct. Yes.</p> <p>5 Q. Ms. Notaro is currently the subject</p> <p>6 of a documentary airing on Showtime this month;</p> <p>7 are you aware of that?</p> <p>8 A. Yes.</p> <p>9 Q. Are those are just two of the 60</p> <p>10 actor artists under your labels, correct?</p> <p>11 A. Correct.</p> <p>12 Q. I take it then that you believe that</p> <p>13 your signed artists compare favorably to those</p> <p>14 signed to other labels such as the majors; is</p> <p>15 that fair?</p> <p>16 A. We do have great beliefs in our</p> <p>17 artists, yes.</p> <p>18 Q. And independent labels have released</p> <p>19 some of the most prominent and commercially</p> <p>20 successful records of all time, true?</p> <p>21 A. Yes.</p> <p>22 Q. Just to name a few, Paul McCartney,</p> <p>23 Adele, Taylor Swift, those are all artists under</p> <p>24 the independent labels, correct?</p> <p>25 A. Depends on the territory and depends</p>	631	<p>1 This is testimony that you actually</p> <p>2 referenced on direct, that you provided to the</p> <p>3 committee on -- the judiciary subcommittee on</p> <p>4 Court's intellectual property and the Internet</p> <p>5 on June 24th, correct?</p> <p>6 A. Sorry, which page?</p> <p>7 Q. You can start on the title page.</p> <p>8 A. Oh. Yes.</p> <p>9 Q. You gave that testimony under oath?</p> <p>10 A. Yes, I did.</p> <p>11 Q. You testified -- turning to Page 2,</p> <p>12 that being independent doesn't mean being small,</p> <p>13 correct?</p> <p>14 A. Correct.</p> <p>15 Q. And you also note in the second --</p> <p>16 the third full paragraph, last sentence that:</p> <p>17 "Independents also currently release over 90</p> <p>18 percent of all music released by music labels in</p> <p>19 the United States. We are not on the margins of</p> <p>20 the music industry, we are together with the</p> <p>21 artist creator who we support at the very</p> <p>22 vibrant core."</p> <p>23 Did you give that testimony?</p> <p>24 A. Yes. Yes, I did.</p> <p>25 Q. And you are proud of the fact that</p>

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632	<p>1 were it not for independent labels, some music 2 would otherwise never be heard, right? That's 3 part of your direct testimony? 4 A. Yes. 5 Q. And you would agree that it would to 6 the detriment of the listening public not to 7 have wide exposure to good music, right? 8 A. Yes. 9 Q. And just like major labels, you spend 10 a great deal of time and effort seeking out 11 recording artists to sign, right? 12 A. Yes. 13 Q. You testified about some of those 14 efforts to promote the music and career of your 15 artists on direct with SoundExchange's counsel? 16 A. Can you repeat the question. 17 Q. Sure. You testified about some of 18 the efforts that your group undertakes to 19 promote the music and career of your artists? 20 A. Yes, I did so today. 21 Q. And one of the goals of that 22 promotion is to get air play for your artists, 23 correct? 24 A. I don't know if I said -- paid air 25 play, yes.</p>	634	<p>1 featured on grammy.com and pandora.com? 2 A. I don't remember that. Was it done 3 with our approval and involvement? 4 Q. I can refresh your recollection if 5 the judges will allow. This does not have an 6 exhibit number. I'm happy to mark it with -- 7 CHIEF JUDGE BARNETT: If it is just 8 to refresh recollection, then we don't have to 9 mark it. 10 BY MR. YOLKUT: 11 Q. Mr. Van Arman, for the record, the 12 document I just handed you to refresh your 13 recollection is entitled -- it's from 14 grammy.com, from February 2, 2012, entitled: 15 "The recording academy, Pandora and Pepsi 16 provide inside look at best new artists 17 nominated." 18 Do you see that? 19 A. Was this done -- 20 CHIEF JUDGE BARNETT: Mr. Yolkut, I 21 don't think we can have the whole contents of 22 this introduced into the record. It is just to 23 refresh his recollection so your next question 24 should be, does this refresh your recollection. 25 MR. YOLKUT: Thank you, Your Honor.</p>
633	<p>1 Q. It's fair to say that Internet radio 2 has increased the exposure to independent 3 artists, correct? 4 A. Increased the exposure to independent 5 artists, Internet radio has? Is that your 6 question? 7 Q. That's the question. 8 A. I hope it has. I don't know if it 9 has. 10 Q. You haven't undertaken a study? 11 A. No, I haven't. 12 Q. You have no reason to doubt that? 13 A. I have no reason to believe it 14 either. 15 Q. Are you aware of promotional 16 activities that Pandora, for example, has 17 undertaken to the benefit of your artists? 18 A. With -- in connection with the Merlin 19 Pandora deal? 20 Q. No. 21 A. Refresh my memory. 22 Q. Sure. I am happy to. Do you recall, 23 for example, that as the lead up to the 2012 24 Grammy awards, Pandora co-produced an exclusive, 25 promotional video showcasing Bon Iver which was</p>	635	<p>1 MS. VOLKMAR: Can we get a copy back 2 here. 3 MR. YOLKUT: Absolutely. 4 THE WITNESS: I don't remember this 5 being something we agreed to. I am wondering if 6 this is something the artist agreed to. 7 BY MR. YOLKUT: 8 Q. Bon Iver is one of your artists, 9 correct? 10 A. What we -- he's not an exclusive with 11 us. 12 Q. But he is under the Jagjaguwar label? 13 A. Yes. We released a recording for 14 him. 15 Q. This was in the lead up to the 2012 16 Grammy awards? 17 A. I don't remember this. 18 Q. Okay. You can put that aside. 19 Are you aware that Pandora also 20 creates Grammy genre stations featuring Bon Iver 21 and others? 22 A. I am aware that Pandora does create 23 genre stations, yes. 24 Q. Rate or air play on Pandora 25 translates into greater royalties for your</p>

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636	<p>1 record labels and your artists, correct?</p> <p>2 A. Correct.</p> <p>3 Q. You testified on direct that your</p> <p>4 goal is to make a profit, correct?</p> <p>5 A. Yes.</p> <p>6 Q. And in response to Judge Strickler's</p> <p>7 question, I believe you testified that you are,</p> <p>8 in fact, profitable, correct?</p> <p>9 A. Yes, on the aggregate, we are</p> <p>10 profitable.</p> <p>11 Q. Now you were asked about royalty</p> <p>12 rates being cut in half.</p> <p>13 Do you recall that question?</p> <p>14 A. Yes.</p> <p>15 Q. Now, did you have in mind, when you</p> <p>16 heard that question about rates being cut in</p> <p>17 half, did you have in mind that it was cutting</p> <p>18 in half from the rate that Pandora currently</p> <p>19 pays or what you -- what Pandora would be paying</p> <p>20 as to the Web II or Web III decisions?</p> <p>21 A. You are talking about -- when you are</p> <p>22 saying what Pandora currently pays, you are</p> <p>23 referring to the Pure Play rate and you are</p> <p>24 comparing that to the statutory rate that is for</p> <p>25 all other Webcasters?</p>	638	<p>1 Q. When Merlin is able to reach an</p> <p>2 agreement with a particular service, it says its</p> <p>3 members have notice of proposed action, right,</p> <p>4 describing the deal terms?</p> <p>5 A. Yes.</p> <p>6 Q. And giving each member label the</p> <p>7 opportunity to opted out of the deal, correct?</p> <p>8 A. Correct.</p> <p>9 Q. And Secretly Group receives those</p> <p>10 notices as a member of Merlin?</p> <p>11 A. Not Secretly Group. SC Distribution.</p> <p>12 Q. SC Distribution, your distribution</p> <p>13 source, correct?</p> <p>14 A. Our affiliated distribution company.</p> <p>15 Q. And I believe you testified on direct</p> <p>16 that independents sometimes face difficulty</p> <p>17 getting access.</p> <p>18 Do you recall that testimony?</p> <p>19 A. Yes.</p> <p>20 Q. And I believe you testified that</p> <p>21 Merlin helps to mitigate that, correct?</p> <p>22 A. Some services, you know -- not only</p> <p>23 our own experience but the experience of other</p> <p>24 labels that we've discussed this with -- won't</p> <p>25 enter into deals with labels that don't have the</p>
637	<p>1 Q. Correct.</p> <p>2 A. I think I was thinking about the full</p> <p>3 statutory royalty rate, not the Pure Play rate.</p> <p>4 Q. Okay. Thank you. I believe you also</p> <p>5 testified on direct that the digital revenues of</p> <p>6 the Secretly Group have actually more than</p> <p>7 tripled over the past five years, correct?</p> <p>8 A. Correct.</p> <p>9 Q. You included within that answer</p> <p>10 revenues from streaming services such as</p> <p>11 Pandora, correct?</p> <p>12 A. I don't think that is included in</p> <p>13 those numbers. I'm not sure. That is based on</p> <p>14 -- the analysis was done based on what we</p> <p>15 received through our distribution agreements and</p> <p>16 Pandora, until recently, was a statutory</p> <p>17 license, and so when we received that income, it</p> <p>18 is not something that we have coming through our</p> <p>19 distribution agreements. So -- but Pandora's</p> <p>20 streaming revenues are growing for us.</p> <p>21 Q. Right. Okay. That's what I was</p> <p>22 going to get at in my next question.</p> <p>23 There's money flowing from Pandora to</p> <p>24 your company, right?</p> <p>25 A. Right.</p>	639	<p>1 scale of repertoire. They will only enter into</p> <p>2 an agreement with Merlin, is my experience.</p> <p>3 Q. Because Merlin has the scale of</p> <p>4 repertoire though, right?</p> <p>5 A. They're representing a larger basket</p> <p>6 of rights.</p> <p>7 Q. Thank you, sir.</p> <p>8 A. Yeah.</p> <p>9 Q. And you consider the terms that are</p> <p>10 offered to SC Distribution in deciding whether</p> <p>11 to opt out of the deal, correct?</p> <p>12 A. Correct.</p> <p>13 Q. And in several cases, your company</p> <p>14 has agreed to opt into licensing deals</p> <p>15 negotiated by Merlin after reviewing the terms</p> <p>16 of the deal, correct?</p> <p>17 A. SC Distribution typically does</p> <p>18 because it's a distributor.</p> <p>19 Q. And generally speaking, you would opt</p> <p>20 into a deal when you come to the view that it</p> <p>21 would be to your company's economic benefit to</p> <p>22 do so, right?</p> <p>23 Does that makes sense?</p> <p>24 A. For a distributor for there's very</p> <p>25 little downside into opting into a deal because</p>

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640	<p>1 you're giving the label to distribute the option 2 to participate in that deal. And part of your 3 job as a distributor is to give all sorts of 4 revenue opportunities to the labels you 5 distribute. 6 Q. But in any event, they would be 7 receiving the opt-in notice and would consider 8 whether or not to opt in, correct? 9 A. Right. So SC Distribution does 10 approach the labels it distributes and asks each 11 of its labels it distributes whether it wants to 12 opt in or opt out. 13 JUDGE STRICKLER: Excuse me, Counsel. 14 I think at one point you questioned 15 the witness and asked about the opt-out. And 16 the next question you asked about an opt-in. 17 Is it an opt-in or an opt-out? Or 18 maybe you can just ask the witness the question. 19 MR. YOLKUT: I'm happy to ask the 20 witness. 21 BY MR. YOLKUT: 22 Q. Sir, when you receive the notice of 23 proposed action, is the intent of that to ask 24 the members whether to opt in or opt out? 25 A. If it's okay, can I look at the</p>	642	<p>1 restricted. 2 Don't answer the question. It's a 3 question for counsel as to whether they believe 4 this is restricted information relating to this 5 agreement. 6 MR. POMERANTZ: Your Honor, we don't 7 have Merlin here in the room. So maybe, to play 8 it safe, we should either close the room or just 9 deal with this on the rebuttal case. We're 10 going to be dealing with this -- 11 MR. YOLKUT: Your Honor, I agree with 12 Mr. Pomerantz on that. 13 JUDGE STRICKLER: So we're just not 14 going to get an answer. We'll all just stay in 15 suspense until rebuttal? 16 MR. POMERANTZ: We don't want to have 17 any restrictions. 18 JUDGE STRICKLER: How do we get to 19 sleep? 20 MR. YOLKUT: That's what I've been -- 21 MR. RICH: No, Your Honor. Some of 22 that suspense might be alleviated if you want to 23 fast forward. Mr. Lexton, who is the general 24 counsel of Merlin has submitted a rebuttal 25 testimony. And I suspect in the text of that</p>
641	<p>1 proposal again to refresh my memory? Because I 2 can't remember -- for us, we always respond 3 either way. So I can't remember whether it's 4 automatically going to opt us in or if we have 5 to affirmatively opt in. We usually say yes or 6 no either way. 7 Q. So if you look at Pan Ex 5210, which 8 is in your binder, does that refresh your 9 recollection? 10 JUDGE STRICKLER: Before you answer 11 that question, the first page of this is 12 strictly confidential on distribution. 13 Do we need to be closing the 14 courtroom for him to answer this question? 15 MR. YOLKUT: We're not going to be 16 displaying it on the screen. And I think I will 17 be able to limit my examination solely to Your 18 Honor's question about the opt-in versus the 19 opt-out. 20 And if the witness doesn't know, I'm 21 happy to stands on that testimony. 22 JUDGE STRICKLER: Well, that may be 23 fine. I just want to make sure. If even that 24 is restricted, at least we have an opportunity 25 to close the courtroom if it's believed to be</p>	643	<p>1 testimony lies your answer. 2 JUDGE STRICKLER: And that's how I 3 get to sleep. 4 MR. YOLKUT: Thank you to my senior 5 partner. 6 BY MR. YOLKUT: 7 Q. Now, Mr. Van Arman, you've previously 8 expressed the view that market concentration 9 within the music industry is, quote, a primary 10 threat to the musical creative enterprise, 11 correct? 12 A. I'm worried about it, yes. 13 Q. And you've noted on there that 25 14 years ago there were six major labels in the 15 recording music market; now there are only 16 three, correct? 17 A. Yes. 18 Q. And, in fact, you testified to 19 congress that the three major recording 20 companies have used their market clout to 21 extract a disproportionate share of 22 copyright-related revenue from the marketplace, 23 correct? 24 A. Correct. And I think that's when I 25 was testifying on digital breakage practices.</p>



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644	<p>1 Q. And some of those digital breakage 2 practices you've testified about here today, 3 correct? 4 A. Correct. 5 Q. And that includes the practice of 6 advances for guarantees so large that there's no 7 recourse, correct? 8 A. Yes. When -- when -- 9 Q. Thank you. 10 And you stand by that congressional 11 testimony, correct? 12 A. Yes, I do. 13 MR. YOLKUT: Okay. Thank you. 14 No further questions, other than to 15 say that, on the pro rata terms discussion that 16 was the subject of counsel's question, we will 17 reserve our cross until rebuttal on that. 18 MS. ELGIN: NAB has no questions, 19 Your Honor. 20 CROSS-EXAMINATION BY COUNSEL FOR IHEARTMEDIA 21 BY MS. POPE: 22 Q. Good afternoon, Mr. Van Arman. 23 My name is Leslie Pope, and I 24 represent iHeartRadio. 25 In your testimony on Page 10, you</p>	646	<p>1 share incentives will become an inevitability; 2 is that correct? 3 A. Yes. 4 Q. These deals would become an 5 inevitability because they can be win-win deals 6 for both of the parties, correct? 7 A. I don't know what you mean by 8 "win-win." 9 Q. The service wins by reducing its 10 royalty cost, correct? 11 A. Okay. And how do the other side win, 12 by getting more spins? 13 Q. You anticipated my question. 14 A. Yes. 15 Q. The label wins by getting more plays, 16 correct? 17 A. I would -- in that negotiation, that 18 label acting in its self-interest, in the short 19 term, it can get a benefit, yes. 20 Q. In fact, you said that entering into 21 a deal with a play share incentive was a good, 22 competitive move for your company. 23 A. I would characterize it as a 24 defensive maneuver. We're concerned about 25 actually just maintaining our fair share of</p>
645	<p>1 describe certain trends that you've observed in 2 the direct licensing markets, correct? 3 A. Can I have a chance to look at it? 4 Okay. Can you repeat the question. 5 I'm sorry. 6 Q. You describe certain trends you've 7 observed in the direct licensing market, 8 correct? 9 A. Correct. 10 Q. One of the trends you identify is the 11 use of play share incentive, correct? 12 A. Correct. 13 Q. In a deal with a play share 14 incentive, a service pays a lower rate in 15 exchange for playing more music owned by the 16 record label, correct? 17 A. That is one way it can -- play shares 18 tend to be very creative. But yes, it can be 19 asking for a discount on what would be the 20 otherwise prevailing royalty rates in exchange 21 for more spins. 22 Q. If I can direct you to Page 14 of 23 your testimony. In the top paragraph you say 24 you're afraid that, without a strong statutory 25 right, the proliferation of deals with play</p>	647	<p>1 streams on a streaming service like Pandora. 2 And so for us, one of the prime motivations was 3 we actually just prefer there's no play share 4 incentives. 5 However, in how we're experiencing 6 the marketplace, where we're often the last 7 mover, here was a unique opportunity for us to 8 be a first mover and to look in, you know, what 9 we think is close to a level playing field for 10 ourselves. 11 Q. To be clear, Mr. Van Arman, did you 12 or did you not testify earlier today that 13 entering into a deal with a play share incentive 14 was a good competitive move for your company? 15 A. I think I said it was in our 16 self-interest. 17 Q. I'll let the record speak for itself. 18 Would you also expect to see a 19 proliferation of deals with play share incentive 20 if the statutory rate didn't exist at all? 21 A. Can you repeat the question. 22 Q. You said in your testimony that we 23 were just looking at that, without a strong 24 statutory rate, you would expect proliferation 25 of deals with play share incentives.</p>

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648	<p>1 I'm asking would you also expect to</p> <p>2 see a proliferation of deals with play share</p> <p>3 incentives if the statutory rate didn't exist at</p> <p>4 all?</p> <p>5 A. I'm not an economist, but I don't</p> <p>6 know if there's necessarily a correlation. You</p> <p>7 know, one could argue that, if there was a very</p> <p>8 strong statutory license, that that would be</p> <p>9 fertile grounds for play share incentives. So I</p> <p>10 don't know how I can answer this question.</p> <p>11 Q. As you said, you're not an economist,</p> <p>12 right?</p> <p>13 A. I'm not an economist or a lawyer.</p> <p>14 Q. Also on Page 14, you say that labels</p> <p>15 enter into deals with play share incentive --</p> <p>16 labels that enter into deals with play share</p> <p>17 incentives get the play share benefit of signing</p> <p>18 on first.</p> <p>19 The benefit you're describing here is</p> <p>20 more plays, right?</p> <p>21 A. More revenue. And also the defensive</p> <p>22 position that I was talking about earlier.</p> <p>23 Q. Didn't you say earlier that one of</p> <p>24 the benefits of entering into a play share</p> <p>25 incentive deal is that you can grow your market</p>
649	<p>1 share?</p> <p>2 A. Are you talking about my companies or</p> <p>3 companies in general? Because I mean I can</p> <p>4 imagine that some companies would be motivated</p> <p>5 about, you know, increasing their market share,</p> <p>6 and that's why they enter into play share</p> <p>7 incentive deals.</p> <p>8 Our motivation was not to increase</p> <p>9 our market share. It was more of a defensive</p> <p>10 posture.</p> <p>11 Q. You say on Page 14 that you're</p> <p>12 concerned that record labels will devalue their</p> <p>13 music just to have their songs heard.</p> <p>14 Why would a label devalue its music</p> <p>15 just to have its songs heard?</p> <p>16 A. I think some labels believe that</p> <p>17 radio promotion leads to sales. And there's a</p> <p>18 lot of incorrect beliefs on that.</p> <p>19 And so we're concerned that -- we're</p> <p>20 concerned that, if there's belief of radio play</p> <p>21 being correctly -- being directly, you know,</p> <p>22 something that leads to sales, and then small</p> <p>23 companies are worried about surviving and are</p> <p>24 looking to get a deal that can maybe help them</p> <p>25 change their tide, that they might be interested</p>
650	<p>1 in a play share incentive kind of deal.</p> <p>2 Q. Do you believe that your competitors</p> <p>3 hold the mistaken belief that radio promotes?</p> <p>4 A. We don't necessarily believe that all</p> <p>5 the time.</p> <p>6 Q. When you say you're concerned about a</p> <p>7 race to the bottom, your concern is that record</p> <p>8 labels will compete with each on price to get</p> <p>9 more plays, right?</p> <p>10 A. Yes.</p> <p>11 Q. How far would labels be willing to go</p> <p>12 to win this race; all the way to zero?</p> <p>13 A. I can only speak for our companies.</p> <p>14 We wouldn't go to zero. I think that if</p> <p>15 everyone went to zero, that's not viable either.</p> <p>16 I can major some companies deciding</p> <p>17 to go to zero temporarily. But, you know, I</p> <p>18 think, at the end of the day, our feeling is</p> <p>19 that plays and streams on noninteractive</p> <p>20 services is our product. It's our compensation.</p> <p>21 You know, we're in a new economy now</p> <p>22 where it's not about getting air play to promote</p> <p>23 the sales of something else; it is the actual</p> <p>24 product that we're trying to promote.</p> <p>25 Q. You also say you're worried that</p>
651	<p>1 labels will have to choose between offering</p> <p>2 lower rates and being left out of services'</p> <p>3 playlists.</p> <p>4 Would it be detrimental for a label</p> <p>5 to have its music left out from the playlist?</p> <p>6 A. For the consumer, yes.</p> <p>7 Q. Not for the label?</p> <p>8 A. Yes. It can be detrimental. But it</p> <p>9 could also be in, you know, their business</p> <p>10 judgment that, by being left out of a playlist</p> <p>11 on one service, that consumers are going to go</p> <p>12 to another service for their music.</p> <p>13 Q. Labels want services to play more of</p> <p>14 their music, not less, right?</p> <p>15 A. Can you repeat the question, please.</p> <p>16 Q. Labels want services to play more of</p> <p>17 their music, not less?</p> <p>18 A. When the streams are paid, yes.</p> <p>19 Q. Does your label group, Secretly</p> <p>20 Group, monitor whether service like iHeartRadio</p> <p>21 and Pandora are playing its music?</p> <p>22 A. Yes.</p> <p>23 Q. So you would notice if iHeartRadio</p> <p>24 was playing your music?</p> <p>25 A. Yes.</p>

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652	<p>1 MS. POPE: I'd like to distribute</p> <p>2 iHeartMedia Exhibit 3569, which is an e-mail</p> <p>3 dated November 2013.</p> <p>4 BY MS. POPE:</p> <p>5 Q. Who is Hannah Carlen?</p> <p>6 A. She's one of our employees. She</p> <p>7 manages our radio department.</p> <p>8 Q. Have you seen this document before?</p> <p>9 A. I saw it at yesterday, yes.</p> <p>10 Q. Any reason to believe this is not an</p> <p>11 e-mail from Hannah Carlen to iHeartRadio?</p> <p>12 A. No reason to believe it's not an</p> <p>13 e-mail from her. I think it is an e-mail from</p> <p>14 her.</p> <p>15 MS. POPE: We offer iHeartMedia</p> <p>16 Exhibit 3569.</p> <p>17 CHIEF JUDGE BARNETT: Hearing no</p> <p>18 objection, 3569 is admitted.</p> <p>19 (iHeart Exhibit No. 3569 was admitted</p> <p>20 into evidence.)</p> <p>21 BY MS. POPE:</p> <p>22 Q. If you turn to the first e-mail on</p> <p>23 the chain, which is an e-mail from Ms. Carlen,</p> <p>24 Ms. Carlen writes: "I am noticing some random</p> <p>25 but significant holes in what</p>	654	<p>1 A. Because Warner Music Group</p> <p>2 accidentally took all of our content down even</p> <p>3 though we never delivered to Warner Music Group</p> <p>4 to iHeartRadio.</p> <p>5 Q. And she wants to rectify that error?</p> <p>6 A. Correct. Because it's paid streams.</p> <p>7 It's not -- it's for all of our repertoire.</p> <p>8 Q. She mentions in this e-mail that you</p> <p>9 did Digital Artist Integration for two months</p> <p>10 with Cayucas.</p> <p>11 Do you know if you were paid for</p> <p>12 those streams?</p> <p>13 A. My understanding of the -- that</p> <p>14 program is that we are paid for it in exchange</p> <p>15 for advertising, in-kind advertising.</p> <p>16 Q. You don't receive royal rates for --</p> <p>17 royalties from SoundExchange for songs played as</p> <p>18 part of the Digital Artist Integration Program,</p> <p>19 correct?</p> <p>20 A. For that one artist, of the many</p> <p>21 hundreds of artists, we did not for two months.</p> <p>22 But we did receive advertising, which we put</p> <p>23 value on.</p> <p>24 Q. And by "advertising" you mean plays</p> <p>25 of that song on iHeartRadio?</p>
653	<p>1 artists/singles/catalog is available from our</p> <p>2 artists at iHeartRadio."</p> <p>3 A. Yes. And I can explain the</p> <p>4 circumstances of that if that's useful.</p> <p>5 Q. You say it doesn't surprise you that</p> <p>6 Ms. Carlen noticed these holes?</p> <p>7 A. Part of her job is to pay attention</p> <p>8 to what is being performed in the marketplace.</p> <p>9 Q. In this same e-mail, she says: "I</p> <p>10 think some of it may be a byproduct of search</p> <p>11 function glitches. Cayucas yields no results,</p> <p>12 for example, even though we did Digital Artist</p> <p>13 Integration for two months. But I'm wondering</p> <p>14 how best to fill in the blanks."</p> <p>15 She's asking how to make more of</p> <p>16 Secretly Group's music available on iHeartRadio,</p> <p>17 right?</p> <p>18 A. No. She's actually addressing a</p> <p>19 technical glitch.</p> <p>20 When we were with Warner Music Group,</p> <p>21 we were digitally distributed by them until the</p> <p>22 end of 2013. When --</p> <p>23 Q. The music doesn't appear on -- she's</p> <p>24 asking how she can get your music back on</p> <p>25 iHeartRadio, correct?</p>	655	<p>1 A. No. I think they actually promote</p> <p>2 via some sort of advertisement only iHeartRadio</p> <p>3 what Cayucas is or who Cayucas is. That's my</p> <p>4 understanding of the program.</p> <p>5 Q. You're referencing online material</p> <p>6 promoting the plays of Cayucas on iHeartRadio?</p> <p>7 A. It's advertising. Just like a print</p> <p>8 ad you'd buy in a magazine.</p> <p>9 Q. Okay. If you look at Page 3 of the</p> <p>10 document, which is an e-mail dated November 7,</p> <p>11 2013, Ms. Carlen writes: "Wonderful. Yeah, you</p> <p>12 should see the releases from Secretly Canadian,</p> <p>13 Jagjaguwar and Dead Oceans. Priority singles to</p> <p>14 repopulate are," and then lists 15 songs.</p> <p>15 This list includes some of your most</p> <p>16 popular singles, right?</p> <p>17 A. Correct, yes.</p> <p>18 Q. "Skinny Love" made it onto the</p> <p>19 Billboard Top 40, right?</p> <p>20 A. Yes.</p> <p>21 Q. Paula Ceni was nominated for a</p> <p>22 Grammy, right?</p> <p>23 A. Correct.</p> <p>24 Q. And we heard earlier that Bon Iver is</p> <p>25 a multiple Grammy award winner, right?</p>

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656	<p>1 A. Yes.</p> <p>2 Q. I want to look at the November 15th</p> <p>3 e-mail at the bottom of Page 1.</p> <p>4 Here Ms. Carlen writes in the second</p> <p>5 paragraph: "Similarly, does the take-down mean</p> <p>6 that any songs we had seated on station are now</p> <p>7 out of the mix? And if so, is there anything I</p> <p>8 can do to rectify?"</p> <p>9 Ms. Carlen is asking is there</p> <p>10 anything she can do to get your music back on</p> <p>11 iHeartRadio's custom stations here, correct?</p> <p>12 A. I think so. I think she's -- yes.</p> <p>13 I'm not sure what the distinction between the</p> <p>14 custom stations and iHeart's Webcasting. I'm</p> <p>15 not in her position. But yes, I think she's</p> <p>16 trying to get our repertoire back on</p> <p>17 iHeartRadio.</p> <p>18 And my understanding is that, when</p> <p>19 our content is streamed on iHeartRadio, we're</p> <p>20 paid. And so when she's pointing out our most</p> <p>21 popular recordings, it's good business to say,</p> <p>22 "Hey, you know, favor these to go up first</p> <p>23 because that's what is going to be streamed</p> <p>24 more. And that means more revenue for us."</p> <p>25 MS. POPE: I think I can leave it</p>	658	<p>1 high statutory rate, it would be a lot easier to</p> <p>2 engage in a play share incentive because you</p> <p>3 could cut your rate, get more plays; but all</p> <p>4 other things being equal, since you started from</p> <p>5 a higher, stronger one, you would be more apt to</p> <p>6 do it.</p> <p>7 Whereas, if you had a lower statutory</p> <p>8 rate that was already cutting into your profit,</p> <p>9 you would be less willing.</p> <p>10 THE WITNESS: And I think I actually</p> <p>11 confirmed that just right now. I agree. I</p> <p>12 don't know if there's necessarily a correlation</p> <p>13 between a high statutory rate and whether play</p> <p>14 share incentives will go away or not.</p> <p>15 Maybe when I've been talking about</p> <p>16 strong statutory royalty rate, I'm not</p> <p>17 necessarily only talking about the actual rate.</p> <p>18 I may be talking about -- you know, as I've</p> <p>19 testified in congress, you know, I believe that</p> <p>20 things like play share incentives and</p> <p>21 nontransparent commercial terms dictating what</p> <p>22 is played on the air shouldn't be allowed.</p> <p>23 JUDGE STRICKLER: Well, let's just</p> <p>24 change the word "rate" to the word "value."</p> <p>25 If you had a strong -- well, you used</p>
657	<p>1 there with this document.</p> <p>2 And let us all leave since I've gone</p> <p>3 over time, and you have been very kind in</p> <p>4 letting me do so. Thank you.</p> <p>5 JUDGE STRICKLER: I wanted to ask the</p> <p>6 witness a question.</p> <p>7 On Page 14 of your testimony, your</p> <p>8 first paragraph that begins with the bold "Pro</p> <p>9 Rata Terms."</p> <p>10 Do you see that?</p> <p>11 THE WITNESS: Yes. Yes, Your Honor.</p> <p>12 JUDGE STRICKLER: The last sentence</p> <p>13 there reads: "Without a strong statutory rate</p> <p>14 that allows record companies, whether major or</p> <p>15 independent, to reject play share incentives, I</p> <p>16 am afraid this will become an inevitably."</p> <p>17 That is the inevitably being the</p> <p>18 play -- people adopting -- companies adopting</p> <p>19 the play share incentives, right?</p> <p>20 THE WITNESS: Correct.</p> <p>21 JUDGE STRICKLER: Why do you think</p> <p>22 that you need a strong or higher statutory rate</p> <p>23 to be able to reject play share incentives?</p> <p>24 Because it seems to me economically</p> <p>25 it would be the other way around. If you had a</p>	659	<p>1 statutory, so maybe that's not right way to</p> <p>2 approach you with the question. So let's just</p> <p>3 leave your answer as the final word.</p> <p>4 THE WITNESS: Okay. Thank you, Your</p> <p>5 Honor.</p> <p>6 MR. CHOUDHURY: I have two minutes of</p> <p>7 redirect, Your Honor.</p> <p>8 CHIEF JUDGE BARNETT: Two minutes?</p> <p>9 MR. CHOUDHURY: Yeah. And that way</p> <p>10 we can finish with this witness.</p> <p>11 CHIEF JUDGE BARNETT: Okay.</p> <p>12 REDIRECT EXAMINATION BY COUNSEL FOR</p> <p>13 SOUNDEXCHANGE</p> <p>14 BY MR. CHOUDHURY:</p> <p>15 Q. Mr. Van Arman, I'm going to ask you</p> <p>16 to look at the e-mails --</p> <p>17 CHIEF JUDGE BARNETT: Excuse me,</p> <p>18 Mr. Choudhury.</p> <p>19 Does the NAB have questions for this</p> <p>20 witness?</p> <p>21 MS. ELGIN: No, Your Honor.</p> <p>22 CHIEF JUDGE BARNETT: Mr. Falker?</p> <p>23 MR. FALKER: No, Your Honor.</p> <p>24 CHIEF JUDGE BARNETT: Okay. Now you</p> <p>25 may.</p>

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660	<p>1 MR. CHOUDHURY: On the clock. 2 BY MR. CHOUDHURY: 3 Q. Mr. Van Arman, can I ask you to take 4 a look at that e-mail that you were just 5 questioned about, IHM 3569? 6 A. Yes. 7 Q. Can you explain what was -- you 8 started to explain. 9 Can you explain what was -- what is 10 your understanding of what this e-mail chain is 11 about? 12 A. Yes. So when we were transitioning 13 our digital distribution from Warner Music Group 14 to ourselves in the fall of 2013, going into the 15 beginning of 2014, at that same time Warner 16 Music Group had entered into a Clear Channel 17 direct license. 18 We were approached by Warner Music 19 Group whether -- you know, even though our time 20 was short with them, whether we should enter 21 into that license or not. 22 Because we were taking all of our 23 digital distribution back and being an 24 independent distributor of our content, we 25 declined.</p>	662	<p>1 Huppe was going to go today, and I need to have 2 discussions with our colleagues here and with 3 Mr. Huppe to figure out where we're going to put 4 him. So we'll let you know. 5 That's our current understanding. 6 JUDGE STRICKLER: Were Mr. Hair and 7 Dr. McFadden, to coin a phrase, must-haves for 8 tomorrow? 9 MR. POMERANTZ: Yeah. I think 10 Professor Lys is a must-have as well. So we're 11 hoping to see if we can get everybody to get all 12 three of them on and off tomorrow. That's our 13 goal. 14 MR. RICH: We're doing the steering 15 to make it happen. 16 CHIEF JUDGE BARNETT: As long as 17 counsel are aware, I for one don't need any more 18 warning than that. 19 JUDGE STRICKLER: I like a warning. 20 It gives me something to read to get to sleep. 21 CHIEF JUDGE BARNETT: 9:00 in the 22 morning. I'm going to say we're going to quit 23 at 4:15 because I mean we're going to quit at 24 4:15. So if we have to bring a witness back, a 25 must-have who can't come back, then we'll have</p>
661	<p>1 However, when all of our digital 2 distribution repertoire was taken down from 3 Warner Music Group as it was transitioning to 4 us, I think what happened was they accidentally 5 instructed that our repertoire that was on their 6 system for other services be taken down from 7 Clear Channel. 8 And so, as a result, in January or 9 February of 2014 when -- or maybe even earlier 10 when this e-mail chain started, that was 11 addressing the switch that occurred because of 12 the transition. 13 MR. CHOUDHURY: That's all, Your 14 Honor. 15 CHIEF JUDGE BARNETT: Thank you. 16 Thank you, Mr. Van Arman. You may be 17 excused. 18 MR. POMERANTZ: Your Honor, for 19 tomorrow, I just wanted to let you know that 20 we're still in discussions about where -- we're 21 trying to figure out which witnesses have to go 22 on tomorrow. We can send you a letter tonight 23 if you want to just to make sure you know. 24 We think it's going to be Mr. Hair, 25 then Dr. McFadden, and then Mr. Lys. But Mr.</p>	663	<p>1 to bring that witness back. 2 MR. POMERANTZ: Your Honor, which we 3 could do. It just may not be the next day. If 4 that's okay with Your Honor, we can work around 5 that. 6 CHIEF JUDGE BARNETT: You know, if 7 there's a jury, it's a little bit more confusing 8 to have people come and go. But we don't have a 9 jury here. So I think we can handle it. 10 MR. POMERANTZ: Thank you, Your 11 Honor. 12 CHIEF JUDGE BARNETT: Thank you. 13 Have a good evening. Happy World 14 Intellectual Property Day. 15 (Whereupon, the proceeding was 16 concluded at 4:45 p.m.) 17 18 19 20 21 22 23 24 25</p>

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1 CERTIFICATE OF COURT REPORTER

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3 I, Bonnie L. Russo, do hereby certify that  
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7 involved in these proceedings, and, further,  
8 that I am not a relative or employee of any  
9 attorney or counsel employed by the parties  
10 hereto, or financially interested in the  
11 proceedings.

12

13

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17 May 31, 2015

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